TRANSCRIPT OF RECORD

[redacted]

(23,450)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 392.

D. R. WILDER MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

CORN PRODUCTS REFINING COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 9, 1914.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Corn Products Refining Company Defendant in Error and D. R. Wilder Manufacturing Company Plaintiff in Error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-
2 struction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said D. R. Wilder Manufacturing Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal U. S. District Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the District Court of the United States
for the Northern District of Georgia.

Allowed by

BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of Georgia.

And allowed to operate as a supersedeas on bond for $3,200.00 being given.

BENJAMIN H. HILL,
Chief Judge Court of Appeals of Georgia.

3 [Endorsed:] Filed in office Nov. 6, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

4 UNITED STATES OF AMERICA, *ss:*

To Corn Products Refining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of Georgia wherein D. R. Wilder Manufacturing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Benjamin Harvey Hill, Chief Judge of the Court of Appeals of Georgia, this 6th day of November, in the year of our Lord one thousand nine hundred and twelve.

BENJAMIN H. HILL,
Chief Judge Court of Appeals of Georgia.

5 Copy of the within citation received and all other service waived. This 6th day of Nov. 1912.
Nov. 6th.

CORN PRODUCTS REFINING COMPANY,
By JAMES W. AUSTIN,
Its Attorney.

[Endorsed:] Filed in office Nov. 6, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

6 UNITED STATES OF AMERICA,
State of Georgia:

To the Honorable Benjamin Harvey Hill, Chief Judge of the Court of Appeals of Georgia:

The petition of D. R. Wilder Manufacturing Company respectfully shows:

On or about the 2nd day of October, 1912, the Court of Appeals of the State of Georgia returned a final judgment against your petitioner in a certain cause wherein the Corn Products Refining Company, a corporation, was plaintiff, and your petitioner was defendant, for the sum of $2,608.49 and costs, and directed that the remittitur be sent to the City Court of Atlanta for execution in accordance with the judgment theretofore rendered by the said City Court of Atlanta,

as will appear by reference to the records and proceedings in said cause; and that the said Court of Appeals is the highest court of said State in which a decision in said suit could be had.

And that your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error.

Your petitioner relied in the City Court of Atlanta, and in the Court of Appeals of Georgia upon the constitution and laws of the United States as a full and complete defense to the claim of
7 the plaintiff. Petitioner says that it appears by the said judgment and proceedings that in said judgment and proceedings in said cause manifest errors were committed to the prejudice of your petitioner, because it shows that in said suit rights, privileges and immunities were claimed by your petitioner under the constitution and laws of the United States, and the decision in said cause was against the rights, privileges and immunities specially set up and claimed by your petitioner under the said constitution and statutes, as will more fully appear from the record, the answer filed by your petitioner, together with the bill of exceptions and assignments of error under which said cause was appealed from the City Court of Atlanta to the Court of Appeals of Georgia, all of which your petitioner prays to be read and considered as a part hereof.

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statute of the United States for such cases made and provided, because your petitioner claimed, and does now claim, that it had a right, privilege and immunity under the Act approved July 2, 1890, entitled "An Act To Protect Trade And Commerce Against Unlawful Restraints And Monopolies," from being sued or held liable for the sales set out in the plaintiff's suit, for the reason that the said sales constituted a part of contracts in restraint of interstate trade and commerce in violation of the aforesaid act, and specifically de-
8 clared to be illegal and unenforcible under the aforesaid act, which said right, privilege and immunity was specifically set up and claimed by your petitioner, as appears by the record and proceedings of said cause, and the City Court of Atlanta and the Court of Appeals of the State of Georgia by the decision herein complained of decided against said right, title, privilege and immunity.

Wherefore, petitioner prays allowance of the writ of error returnable in the Supreme Court of the United States, and for citation and supersedeas, that the errors complained of by your petitioner may be examined and corrected, and the said judgment reversed; and your petitioner will ever pray.

D. R. WILDER MANUFACTURING COMPANY,
By MARION SMITH, *Its Attorney.*

9 In the Court of Appeals of the State of Georgia.

D. R. WILDER MANUFACTURING COMPANY, Plaintiff in Error,
vs.
CORN PRODUCTS REFINING COMPANY, Defendant in Error.

On this the sixth day of November, 1912, the above named plaintiff in error presented its petition for the allowance of a writ of error from the Supreme Court of the United States and its bond for a supersedeas, and prayed an order allowing the said writ of error and allowing the same to operate as a supersedeas.

Now, therefore, this court being the court which rendered the judgment complained of, and the highest court in which a decision in said case can be had, and the undersigned Chief Judge thereof, does hereby allow the said writ of error and order that the same shall operate as a supersedeas on the petitioner in error giving bond in the sum of three thousand two hundred ($3,200.00) dollars, which said bond has this day been approved by me.

BENJAMIN H. HILL,
Chief Judge Court of Appeals of Georgia.

Filed in office Nov. 6, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

10 Know all men by these presents, That we, D. R. Wilder Manufacturing Company, as principal, and D. R. Wilder, as sureties, are held and firmly bound unto Corn Products Refining Company in the full and just sum of three thousand two hundred dollars, to be paid to the said obligee, its successors, and assigns, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 6th day of November, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a Court of Appeals of Georgia in a suit depending in said court, between D. R. Wilder Manufacturing Company and Corn Products Refining Company, a judgment was rendered against the said D. R. Wilder Manufacturing Company and the said D. R. Wilder Manufacturing — having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Corn Products Refining Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said D. R. Wilder Manufacturing Company shall prosecute its writ

of error to effect, and answer all damages and costs if it fail
11 to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

D. R. WILDER MANUFACTURING COMPANY,
By D. R. WILDER, *Pres.* [SEAL.]
D. R. WILDER. [SEAL.]

Sealed and delivered in presence of
[SEAL.] HARRY F. ANSLEY,
N. P., Fulton Co., Ga.

Approved by
BENJAMIN H. HILL,
Chief Judge Court of Appeals of Georgia.

Filed in office Nov. 6, 1912. Logan Bleckley, Clerk Court of Appeals of Georgia.

12 In the Supreme Court of the United States.

D. R. WILDER MANUFACTURING COMPANY, Plaintiff in Error,
vs.
CORN PRODUCTS REFINING COMPANY, Defendant in Error.

The above named plaintiff in error in connection with the petition for a writ of error herein to the Supreme Court of the United States, respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Georgia, there is manifest error in this, towit:

First. The said court erred in sustaining the City Court of Atlanta in holding that the defendant's answer did not set out a good and complete defense, it appearing from said answer that the sales for which suit was brought were directly connected with and a part of certain contracts which were illegal and void and unenforcible under the Act of Congress approved July 2, 1890, entitled "An Act To Protect Trade And Commerce Against Unlawful Restraints And Monopolies."

Second. The Court of Appeals erred in holding that the contracts under which the sales sued for were made were not, under the allegations of the answer, illegal and void and unenforcible
13 under the aforesaid Act of Congress.

Third. The Court of Appeals erred in holding that under the allegations of the answer a recovery could be had upon the account sued on, it appearing from the said answer that the plaintiff in the City Court of Atlanta was an illegal combination intended and having the effect directly to restrain and monopolize trade and commerce in violation of the aforesaid Act of Congress, and that the account was made up within the knowledge of above parties with direct reference to, and in execution of contracts which had for their

object and which had directly the effect to accomplish the illegal ends for which the plaintiff was organized.

Fourth. Because the Court of Appeals erred in holding that the City Court of Atlanta did not err in striking the answer of the defendant and in giving judgment for the plaintiff because the City Court of Atlanta erred in holding that the contracts between the parties shown by the answer with reference to which and in execution of which the account sued on was made up were not illegal and void, under the aforesaid Act of Congress.

Fifth. The said Court of Appeals erred in sustaining the City Court of Atlanta in striking the answer of the plaintiff in error, and in holding that the said answer did not constitute a good and sufficient defense to the plaintiff's suit under the aforesaid Act
14 of Congress approved July 2, 1890.

Sixth. The Court of Appeals erred in rendering the aforesaid judgment in that the same is repugnant to and in conflict with the laws of the United States, and especially the aforesaid Act of Congress approved July 2, 1890.

Seventh. The Court of Appeals erred in construing the aforesaid Act of Congress as not rendering illegal and void the contract between the parties under which the sales sued on were made, and as not rendering illegal and void and unenforcible the said sales under the said contract.

Wherefore, for the above and foregoing errors petitioner in error prays that the judgment of the Court of Appeals of the State of Georgia be set aside and annulled, and reversed, and this case remanded to the City Court of Atlanta with directions to vacate the judgment entered by it herein, and to enter an order overruling and refusing the motion to strike the defendant's answer.

MARION SMITH,
Attorney for Plaintiff in Error.

Filed in office Nov. 6, 1912. Logan Bleckley, Clerk Court of Appeals of Georgia.

15 In the Court of Appeals of the State of Georgia.

D. R. WILDER MANUFACTURING COMPANY, Plaintiff in Error,
vs.
CORN PRODUCTS REFINING COMPANY, Defendant in Error.

Præcipe.

To the Clerk of the Court of Appeals of the State of Georgia:

The above named plaintiff in error does hereby request and require that you incorporate in the record in this cause to the Supreme Court of the United States, the following, towit:

The bill of exceptions.

The transcript of record in the Court of Appeals of Georgia from the City Court of Atlanta.

The opinion of the Court of Appeals and the dissent of Judge Russell.

The judgment of the Court of Appeals.

The original writ of error and citation.

Copies of the petition for the writ, the order allowing the writ, the bond, the assignment of errors, and of this præcipe.

This the 6th day of November, 1912.

D. R. WILDER MANUFACTURING COMPANY,
By MARION SMITH, *Its Attorney.*

16 Service of the above præcipe acknowledged, copy received, and further service waived.

This the 6th day of November, 1912.

CORN PRODUCTS REFINING COMPANY,
By JAMES W. AUSTIN, *Its Attorney.*

Filed in office Nov. 6, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

17 GEORGIA,
Fulton County:

Be it remembered that heretofore in the City Court of Atlanta, his honor Judge H. M. Reid, Judge of said court presiding, in the case of Corn Products Refining Company vs. D. R. Wilder Manufacturing Company, there came on to be heard the motion of the plaintiff to strike the answer of the defendant, and on the 15th day of September, 1911, the court entered an order granting said motion and striking the defendant's answer, to which said ruling and order the defendant then and there excepted, and now excepts, and assigns the same as error in law on the part of the court because said answer set out a good defense to said suit.

The defendant filed its exceptions pendente lite to the said ruling and the same were certified and entered upon the minutes, as provided by law, and the defendant now assigns error upon said exceptions pendente lite so filed and certified.

Subsequently thereto, towit, on the 22nd day of September 1911, the court permitted a verdict to be entered and rendered a judgment thereon in favor of the plaintiff against the defendant for the full amount of the suit and interest, the said verdict being entered and judgment rendered without evidence being introduced, and being allowed by the court because the defendant's answer had
18 been stricken. Having erroneously stricken defendant's answer, said ruling being controlling in the case, and entering into and effecting the further progress and final result of the case, the defendant, therefore, says that the court erred in permitting said verdict to be rendered and in entering up said judgment and excepts thereto and assigns the same as error in law on the part of the court, for the reason that the court having erred in striking

said answer, the verdict and judgment could not be and are not a legal termination of said case.

The defendant specifies the following portions of the record as material to a clear understanding of the errors complained of, towit:

The petition of the plaintiff.

The answer of the defendant.

The motion of the plaintiff to strike the answer of the defendant.

The order of the court granting said motion, and striking the defendant's answer.

The defendant's exceptions pendente lite, and the certificate of the court thereto.

The verdict and judgment.

19 And now, within the time allowed by law, the defendant, the D. R. Wilder Manufacturing Company, presents this, its bill of exceptions, and prays that the same be signed and certified, that the errors alleged to have been committed may be reviewed and corrected by the Court of Appeals of the State of Georgia.

This the 29th day of September, 1911.

SMITH, HASTINGS & RANSOM,
Attorneys for Defendant, D. R. Wilder Manufacturing Company.

Post Office address: Atlanta, Ga.

I do certify that the foregoing bill of exceptions is true and specifies all the record and all the evidence material to a clear understanding of the errors alleged to have been committed. The Clerk of this Court is ordered to make out a complete copy of such portions of the record in this case as are in this bill of exceptions specified, and to certify the same as such, and cause the same to — transmitted to the Court of Appeals of the State of Georgia, that the errors alleged to have been committed may be reviewed and corrected.

20 This 29th day of September, 1911.

H. M. REID,
Judge City Court of Atlanta.

Service of the within bill of exceptions and certificate thereto acknowledged. Copy received. All other and further service waived.

This the 29th day of September, 1911.

JAS. W. AUSTIN.

Filed in office Oct. 3, 1911. Arnold Broyles, Clerk.

GEORGIA,
Fulton County:

I hereby certify, That the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, towit: D. R. Wilder Mfg. Co., plaintiff in error, vs. Corn Products Refining Co., defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of court affixed this 9 day of October, 1911.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

21 (Endorsed:) Case No. 3771. Court of Appeals of Georgia. October Term, 1911. D. R. Wilder Manufacturing Company v. Corn Products Refining Company. Bill of Exceptions. Filed in office Oct. 14, 1911. W. E. Talley, D. C. C. A. Ga.

22 (*Petition.*)

City Court of Atlanta, May Term, 1909.

20512.

CORN PRODUCTS REFINING CO.
vs.
D. R. WILDER MANUFACTURING CO.

GEORGIA,
Fulton County:

To the City Court of Atlanta:

The petition of the Corn Products Refining Company respectfully shows:

1. That the defendant, the D. R. Wilder Manufacturing Company, is a corporation of said State, with its principal office and place of business in the City of Atlanta, in said Fulton County.

2. Your petitioner shows that the defendant is indebted to the said Corn Products Refining Company in the sum of Twelve hundred and forty-seven dollars and eighty five cents ($1247.85) for goods sold and delivered to the defendant as per invoice of date of January 26th, 1909, hereto attached as "Exhibit A" to this petition, with interest at seven per cent per annum on said principal sum since February 1st, 1909.

3. Your petitioner shows that the defendant is further indebted to the said Corn Products Refining Company in the sum of nine hundred and fifty four dollars and fifty nine cents ($954.59) for goods sold and delivered to the defendant as per invoice of
23 date of January 27th, 1909, hereto attached as "Exhibit B" to this petition with interest at seven per cent. per annum on said principal sum since February 2nd, 1909.

4. Your petitioner shows that the defendant although so demanded, has not paid said sums, nor any part thereof.

Wherefore, petitioner prays that process may issue requiring the said D. R. Wilder Manufacturing Company to be and appear at the next term of said court to answer petitioner's complaint.

KONTZ & AUSTIN,
Petitioner's Attorneys.

"EXHIBIT A."

Telephone 6410 Broad. Duplicate. Invoice No. 823.

Corn Products Refining Company.

Order No. Pro. 1052.
Your Order No. C 11306-342-13394.

26 BROADWAY,
NEW YORK, *January* 26, 1909.

Sold to D. R. Wilder Manufacturing Co., Atlanta Ga.
Terms: Net Cash Ten days C. C. L. 82. C. & N. W. I. C. C. of Ga. at Chattanooga.

Packages.	Description.	Lbs.	Price.	Amount.
1	Tank 42′ Mixing Corn Syrup (unmixed). Gross 88080. Tare 28940. Freight Prepaid. Broker.—H. H. Whitcomb. Marks.	59140	2.11	1247.85

24 "EXHIBIT B."

Telephone 6410 Broad. Duplicate. Invoice No. 823.

Corn Products Refining Company.

Order No. Pro 477.
Your Order No. C 11235-342-13394.

26 BROADWAY,
NEW YORK, *January* 27, 1909.

Sold to D. R. Wilder Manufacturing Co., Atlanta, Ga.
Terms: Net Cash Ten days.

Packages.	Description.	Lbs.	Price.	Amount.
60	Barrels Conf. 3 A. Corn Syrup (unmixed). Gross 43423. Tare 3482. Broker.—H. H. Whitcomb Co. Freight Prepaid.	39941	2.39	954.59

A. C. L. 31952 C. P. & St. L. M. & O. C. of Ga. at Chattanooga, or Birmingham.

Filed in office this the 13th day of April, 1909. J. J. Hobby, D. Cl'k.

25 STATE OF GEORGIA,
County of Fulton:

CORN PRODUCTS REFINING COMPANY
v.
D. R. WILDER MANUFACTURING COMPANY.

To the Sheriff, or his Deputy, of said County, Greeting:

The defendant is hereby required, personally or by attorney, to be and appear at the City Court of Atlanta, to be held in and for said county, on the first Monday in May 1909, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness, the Honorable H. M. Reid, Judge of said court, this 13th day of April, 1909.

J. J. HOBBY,
Deputy Clerk.

26 GEORGIA,
Fulton County:

Served the defendant D. R. Wilder Manufacturing Company, a corporation by serving W. J. Peabody its Secretary and Treasurer by leaving a copy of the within writ and process with him in person at the office and place of doing business of said corporation in Fulton County, Ga.

This April 15th, 1909.

J. W. CHAMBERS, *D. Sh'ff.*

27 (*Answer.*)

GEORGIA,
Fulton County:

And now comes the defendant, the D. R. Wilder Manufacturing Co., and answering the plaintiff's petition shows the court the following:

1. The defendant admits paragraphs one and two.

2. The defendant denies paragraphs two and three in the manner and form in which the same are alleged, and further answering said paragraphs the defendant shows that it admits the purchase of the goods at the price alleged in said paragraphs and in Exhibit "A" and Exhibit "B" of said petition. The defendant, however, denies that there can be a legal recovery of the purchase price of said goods for the reason hereinafter set out.

3. The defendant further shows to the court that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, being a corporation formed by the consolidation of the Glucose Refining Co., the American Glucose Co., the United States Sugar Refining Co., the Pope Glucose Co., the Illinois Sugar Refining Co., the National Starch Co., the United Starch Co., the Corn Products Co., the Warner Sugar Refining Co., the St. Louis Syrup & Preserving Co., the New York Glucose Co., and many other firms

and corporations which before the formation of the plaintiff company were independent and competing manufacturing con-
28 cerns, manufacturing and selling goods of the kind sued for in the plaintiff's complaint. Said combination was for the purpose of monopolizing and restraining interstate trade in the products handled by the plaintiff, and did result in a monopoly of interstate trade and in greatly advancing the price at which said commodities were sold, and constituted a combination or conspiracy in violation of the federal statute.

4. Shortly after said combination was effectuated, and while the plaintiff controlled an absolute monopoly of the glucose and grape sugar industry, the plaintiff inaugurated a system of contracts with its purchasers which it referred to as its "profit-sharing plan." Under said system of contracts it agreed to give its purchasers a rebate of some certain amount per hundred pounds upon all purchasers of glucose or grape sugar during any years, provided, and upon the condition that, the said purchaser, during the following year, gave to the said Corn Products Refining Co., its exclusive patronage. All of said contracts were substantially similar, except that the amount of the rebate varied from year to year. The defendant attaches hereto as Exhibit "A" a copy of the contract relative to the rebate on its 1906 business, under which it was agreed to give the defendant a rebate of 10 cents per hundred pounds on all shipments of glucose purchased by it from the plaintiff during 1906 provided it gave to the plaintiff its exclusive trade during the year 1907.
29 A substantially similar contract was entered into relative to trades in 1907, and relative to trades in 1908 and 1909, with this difference relative to the two latter years, viz: that the rebate was advanced from 10 cents to 15 cents per hundred pounds.

5. The defendant alleges that substantially similar contracts were given to practically all consumers of glucose and grape sugar in the United States. The defendant alleges that at the time said so-called profit sharing plan was originated, the plaintiff was the sole firm or corporation in the United States manufacturing and selling glucose and grape sugar, having absorbed all independent and competing concerns, and this defendant and the other manufacturing plants which consumed glucose or grape sugar in the United States were forced to purchase from the plaintiff upon whatever terms could be made, a part of which terms are embraced in this so-called profit sharing plan.

6. Under the working of said system of contracts each purchaser of glucose or grape sugar was placed and kept in a situation whereby if any independent or competing firm or corporation entered into the business of manufacturing or selling glucose or grape sugar, such purchaser by dealing with such independent or competing firm would sacrifice a large rebate on the previous year's business by giving his trade to such independent or competing concern. The
30 entire sysfem of contracts herein outlined, and the contracts hereinafter referred to, were designed for the purpose of preventing competition from arising in the business which had pre-

viously been monopolized by the plaintiff company, and did, in fact, have such effect to a large extent.

7. Defendant alleges that the plaintiff advanced the price of glucose and grape sugar to such exorbitant extent that a few independent concerns have been created and are now attempting to compete with the plaintiff, and are offering lower prices than those asked by the plaintiff, but are having great difficulty in doing so because of the fact that the plaintiff has heretofore obtained a hold upon so large a part of the consumers through the working of the system of contracts heretofore described as the so-called profit sharing plan. The plaintiff is claiming that any consumer who now trades with the said independent concerns, forfeits to the plaintiff the rebate on the 1908 business, and is thereby coercing a large number of consumers into buying from the plaintiff at its advanced prices. The defendant alleges that the prices charged by the plaintiff, even after deducting the rebates, are in excess of the prices charged by the independent firms that are now attempting to compete with the plaintiff, and the prices heretofore charged for glucose and grape
31 sugar price to organization of the plaintiff company, but that the immediate sacrifice claimed by the plaintiff against any consumer who trades with independent concerns as heretofore described, is so great, and so many consumers are uncertain that said independent concerns will continue to do business, that the plaintiff is able to control and coerce a large part of the trade, and still controls a partial monopoly of the trade.

8. The defendant shows that each purchase made by it, and by other purchasers, from the Corn Products Refining Co., contained the following clause in the contract of purchase: "The goods herein sold are for your own consumption only and not for resale."

9. The defendant shows that the sales for the purchase price of which suit is brought were made under the system of contracts herein outlined. The defendant shows that the original combination, the series of contracts known as the profit sharing plan, the provision heretofore referred to in the contracts of sale, and the individual sales, all constituted elements of one general plan or design, which in its entirety, constitutes a combination or conspiracy intended and having the effect directly to restrain and monopolize interstate trade and commerce in violation of the Federal Anti Trust Act of July 2, 1890. The defendant alleges that the account on which suit
32 is brought was made up within the knowledge of both it and the plaintiff with direct reference to and in execution of the agreement heretofore referred to, and that there cannot be a recovery upon said account.

10. Defendant avers that under its contract with the plaintiff for 1908, the plaintiff agreed to allow the defendant a rebate of 15 cents per hundred pounds on all purchases of glucose and grape sugar during the year 1908 upon the conditions heretofore set out. The defendant avers that 15 cents per hundred pounds upon all of its purchases for 1908 amounts to the sum of seventeen hundred and ninety seven dollars ($1,797.01) and one cent. The defendant alleges that the limitation or condition in said contract that it should

trade only with the plaintiff, is illegal, being in restraint of interstate trade in violation of the Federal Anti-Trust Act as heretofore alleged, and is, therefore, not binding upon this defendant, and that this defendant is entitled to said amount notwithstanding its failure to comply with said condition. The defendant therefore prays that said amount be allowed as a counter claim against the plaintiff and that it may have judgment for said amount.

Wherefore, your defendant prays that it be hence dismissed with its reasonable costs.

(Signed) SMITH & HASTINGS,
Defendant's Attorneys.

33 EXHIBIT "A."

Corn Products Refining Company.

26 BROADWAY, NEW YORK, *March* 9, 1907.

The D. R. Wilder Mfg. Co., Atlanta, Ga.

GENTLEMEN: This company recognizing the fact that its own prosperity, in a great measure, is interwoven with the good will and cooperation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage.

This company inaugurates such a policy of profit-sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to ten cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906.

This amount will be paid to you or your successors on December 31, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

34 With the assurance of steadfast cooperation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

Yours very truly,
CORN PRODUCTS REFINING COMPANY,
E. B. WAEDEN.

Filed in office this the 4th day of May, 1911. T. C. Miller, D. Cl'k.

(*Motion to Strike Plea.*)

GEORGIA,
Fulton County:

And now comes the plaintiff in the case above stated, by its attorneys of record, and moves to strike the plea of the defendant in said case, and to enter judgment for the full sum, principal and interest, of the plaintiff's demand therein.

This 8 day of February, 1911.

KONTZ & AUSTIN,
Plaintiff's Attorneys.

35 (*Order.*)

Read and considered. It is ordered that the above motion be filed of record and entered on the motion docket, and that the defendant show cause before me at 10 o'clock a. m., on the 11 day of March 1911, why said motion be not granted and judgment entered as prayed.

This 8 day of Febr'y, 1911.

H. M. REID,
Judge C. C. A.

Due and legal service of the above motion and of the rule nisi thereon is hereby acknowledged. Copy received.

This 8 day of Febr'y, 1911.

SMITH, HASTINGS AND RANSOM,
Attorneys for Defendant.

Filed in office this the 10th day of Feb. 1911. F. M. Myers, D. Clerk.

(*Order.*)

This motion is sustained and the defendant's plea is stricken. The defendant never having made any contract to buy exclusively from the plaintiff this case does not, in my opinion come within the decision in the case of Continental Wall Paper Co. v. Voight, 212 U. S. 227. Sept. 15th, 1911.

H. M. REID, *Judge.*

36 (*Exceptions Pendente Lite.*)

GEORGIA,
Fulton County:

The plaintiff's written motion to strike the answer of the defendant having come on to be heard in said court, his Honor H. M. Reid of said court presiding, the court on the 15th day of September, 1911, entered an order and judgment sustaining said motion and striking

the defendant's answer, to which order and judgment the defendant then and there excepted, and now excepts, and assigned and now assigns the same as error in law on the part of the court for the reason that said motion was not well founded in law and should have been overruled and the defendant's answer should not have been stricken; and now, within the time allowed by law, the defendant presents this, its exceptions pendente lite, and prays that the same be certified by the court and entered on the minutes as provided by law.

This the 18th day of September, 1911.

SMITH, HASTINGS AND RANSOM,
Defendant's Att'ys.

I hereby certify that the foregoing bill of exceptions pendente lite is true. Let the same, together with this certificate, be entered on the minutes. This the 18 day of September, 1911.

H. M. REID,
Judge C. C. A.

Filed in office this the 18th day of Sept. 1911. T. C. Miller, D. Cl'k.

37 (*Verdict.*)

We the jury find for the plaintiff against the defendant $2,202.44 principal and $406.05 interest.

C. H. LEDFORD, *Foreman.*

This the 22nd day of September 1911.

(*Judgment.*)

Whereupon, it is ordered, considered and adjudged by the court that the plaintiff, the Corn Products Refining Company do recover of the defendant the D. R. Wilder Manufacturing Company two thousand two hundred and two dollars and forty four cents principal and four hundred and six dollars and five cents interest together with future interest on said principal at the rate of seven per cent per annum and — dollars costs of suit.

This September 22nd, 1911.

JAS. W. AUSTIN,
Plaintiff's Attorney.

38 STATE OF GEORGIA,
County of Fulton:

I hereby certify, That the foregoing pages, hereunto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required, by the order of the Presiding Judge, to be sent to the Court of Appeals in the case of D. R. Wilder Mfg. Co., plaintiff in error, vs. Corn Products Refining Co., defendant in error.

Witness my signature and the seal of court affixed this the 9 day of October, 1911.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court, Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

39 (Endorsed:) Case No. 3771. Court of Appeals of Georgia, October Term, 1911. D. R. Wilder Manufacturing Co. v. Corn Products Refining Company. Transcript of Record. Filed in office Oct. 14, 1911. W. E. Talley, D. C. C. A. Ga.

40

782.

Court of Appeals of Georgia.

Case No. 3771.

WILDER MANUFACTURING COMPANY
v.
CORN PRODUCTS REFINING CO.

By the COURT:

Suit was brought upon a contract, to recover the purchase-price of goods sold and delivered. The defendant pleaded that the plaintiff was an unlawful combination and conspiracy, formed for the purpose of restraining interstate trade, in violation of the acts of Congress; that through a system of contracts with various purchasers it had secured a monopoly of the business, and that the defendant was forced to purchase the commodity from the plaintiff upon whatever terms could be made. The contract of sale was in writing, and provided that the seller would set aside, out of its profits from the manufacture and sale of the commodity for a certain period, an amount equal to ten cents per hundred pounds on all purchases of the commodity which should be made by the plaintiff during a certain period. It was agreed that this rebate or discount should be paid to the defendant at the end of the year next succeeding the period above mentioned, on condition that for the remainder of the previous year and during the whole of the next year the
41 defendant should have purchased the commodity exclusively from the plaintiff. It was averred, in the answer, that under the working of this system of contracts, each purchaser was placed and kept in a situation whereby, if any competing firm entered into the business, the purchaser, by dealing with such competing firm, would sacrifice a large rebate on the last year's purchases of goods. It was further averred that the entire system of contracts was designed for the purpose of preventing competition, and did in fact prevent competition. It was further averred that the prices charged by the plaintiff were unreasonable, and that each order for goods bought by the defendant contained a clause reciting that the goods were for consumption by

the defendant only, and not for resale. It was further averred that the original combination, the series of contracts referred to in the answer, the stipulation against resale, and the individual sales, all constituted elements of a general plan or design, which in its entirety constituted a combination or conspiracy intended and having the effect to restrain and monopolize interstate trade and commerce, in violation of the Sherman anti-trust act of July 2, 1890; and that the account upon which the suit was brought was made up, in the knowledge of both the defendant and the plaintiff, with direct reference to the agreement heretofore referred to. Held,
42 that the facts set forth in the answer constituted no defense to the action, and that the answer was properly stricken, on motion in the nature of a general demurrer. The case of Continental Wall Paper Co. v. Voight, 212 U. S. 227, is distinguishable from the present case, which falls within the principle announced in Connolly v. Union Sewer Pipe Co., 184 U. S. 539.

RUSSELL, *J.*, dissenting:

I think the case is fully controlled by the ruling of the Supreme Court of the United States in the case of Continental Wall Paper Co. v. Voight, supra, and that the court erred in striking the defendant's answer.

The Corn Products Refining Company brought its action against the D. R. Wilder Manufacturing Company upon an open account for goods sold and delivered. The defendant filed an answer, admitting the purchase of the goods at the price stated in the account, but set up the following defense: "The defendant further shows to the court that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, being a corporation formed by the consolidation of the Glucose Refining Co., the American Glucose Co., the United States Sugar Refining Co., The Pope
43 Glucose Co., the Illinois Sugar Refining Co., the National Starch Co., the United Starch Co., the Corn Products Co., the Warner Sugar Refining Co., the St. Louis Syrup & Preserving Co., the New York Glucose Co., and many other firms and corporations which, before the formation of the plaintiff company, were independent and competing manufacturing concerns, manufacturing and selling goods of the kind sued for in the plaintiff's complaint. Said combination was for the purpose of monopolizing and restraining interstate trade in the products handled by the plaintiff, and did result in a monopoly of interstate trade, and in greatly advancing the price at which said commodities were sold, and constituted a combination or conspiracy in violation of the Federal statute. Shortly after said combination was effectuated, and while the plaintiff controlled an absolute monopoly of the glucose and grape sugar industry, the plaintiff inaugurated a system of contracts with its purchasers, which it referred to as its 'profit-sharing plan.' Under said system of contracts it agreed to give to its purchasers a rebate of some certain amount per hundred pounds upon all purchases of glucose or grape sugar during any years, provided and

upon the condition that the said purchaser, during the following year, gave to the said Corn Products Refining Co. its exclusive patronage. All of said contracts were substantially similar,
44 except that the amount of the rebate varied from year to year.

The defendant attaches hereto, as Exhibit 'A,' a copy of the contract relative to the rebate on its 1906 business, under which it was agreed to give the defendant a rebate of 10 cents per hundred pounds on all shipments of glucose purchased by it from the plaintiff during 1906, provided it gave to the plaintiff its exclusive trade during the year 1907. A substantially similar contract was entered into relative to trades in 1907, and relative to trades in 1908 and 1909, with this difference relative to the two latter years, viz., that the rebate was advanced from 10 cents to 15 cents per hundred pounds. The defendant alleges that substantially similar contracts were given to practically all consumers of glucose and grape sugar in the United States. The defendant alleges that at the time said so-called profit-sharing plan was originated, the plaintiff was the sole firm or corporation in the United States manufacturing and selling glucose and grape sugar, having absorbed all independent and competing concerns, and this defendant and the other manufacturing plants which consumed glucose or grape sugar in the United States were forced to purchase from the plaintiff upon whatever terms could be made, a part of which terms are embraced in this so-called profit sharing plan.

"Under the working of said system of contracts each
45 purchaser of glucose or grape sugar was placed and kept in a situation whereby, if any independent or competing firm or corporation entered into the business of manufacturing or selling glucose or grape sugar, such purchaser, by dealing with such independent or competing firm, would sacrifice a large rebate on the previous year's business by giving his trade to such independent or competing concern. The entire system of contracts herein outlined, and the contracts hereinafter referred to, were designed for the purpose of preventing competition from arising in the business which had previously been monopolized by the plaintiff company, and did, in fact, have such effect to a large extent. Defendant alleges that the plaintiff advanced the price of glucose and grape sugar to such exorbitant extent that a few independent concerns have been created and are now attempting to compete with the plaintiff, and are offering lower prices than those asked by the plaintiff, but are having great difficulty in doing so, because of the fact that the plaintiff has heretofore obtained a hold upon so large a part of the consumers, through the working of the system of contracts heretofore described as the so-called profit-sharing plan. The plaintiff is claiming that any consumer who now trades with the said independent concerns forfeits to the plaintiff the rebate on the 1908 business, and is thereby coercing a large number of consumers into buying
46 from the plaintiff at its advanced prices. The defendant alleges that the prices charged by the plaintiff, even after deducting the rebates, are in excess of the prices charged by the independent firms that are now attempting to compete with the plain-

tiff, and the prices heretofore charged for glucose and grape sugar prior to organization of the plaintiff company, but that the immediate sacrifice claimed by the plaintiff against any consumer who trades with independent concerns as heretofore described is so great, and so many consumers are uncertain that said independent concerns will continue to do business, that the plaintiff is able to control and coerce a large part of the trade, and still controls a partial monopoly of the trade.

"The defendant shows that each purchase made by it, and by other purchasers, from the Corn Products Refining Co. contained the following clause in the contract of purchase: 'The goods herein sold are for your own consumption only, and not for resale.' The defendant shows that the sales for the purchase price of which suit is brought were made under the system of contracts herein outlined. The defendant shows that the original combination, the series of contracts known as the profit-sharing plan, the provision heretofore referred to in the contracts of sale, and the individual sales, all constituted elements of one general plan or design, which in its
47 entirety constitutes a combination or conspiracy intended and having the effect directly to restrain and monopolize interstate trade and commerce in violation of the Federal anti-trust act of July 2, 1890. The defendant alleges that the account on which suit is brought was made up, within the knowledge of both it and the plaintiff, with direct reference to and in execution of the agreement heretofore referred to, and that there cannot be a recovery upon said account. Defendant avers that under its contract with the plaintiff for 1908, the plaintiff agreed to allow the defendant a rebate of 15 cents per hundred pounds on all purchases of glucose and grape sugar during the year 1908 upon the conditions heretofore set out. The defendant avers that 15 cents per hundred pounds upon all of its purchases for 1908 amounts to the sum of $1,797.01. The defendant alleges that the limitation or condition in said contract that it should trade only with the plaintiff, is illegal, being in restraint of interstate trade in violation of the Federal anti-trust act as heretofore alleged, and is, therefore, not binding upon this defendant, and that this defendant is entitled to said amount notwithstanding its failure to comply with said condition. The defendant therefore prays that said amount be allowed as a counter-claim against the plaintiff and that it may have judgment for said amount."

48 The contract between the parties, evidencing what is termed in the answer the "profit-sharing plan," was in the form of a letter as follows (addressed to the defendant company and signed by the plaintiffs): "This company, recognizing the fact that its own prosperity, in a great measure, is interwoven with the good-will and co-operation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage. This company inaugurates such a policy of profit-sharing, by announcing that it will set aside, out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to 10 cents per hundred pounds on all shipments of glucose and grape sugar

(Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906. This amount will be paid to you or your successors on December 31, 1907, on condition that for the remainder of the year 1906 and the entire year 1907 you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment. With the assurance of steadfast co-operation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing dis-
49 tribution annually to the full extent that its earnings may warrant."

The plaintiff moved to strike the answer, and the motion was sustained. The opinion of the trial judge was thus expressed in his order: "This motion is sustained and the defendant's plea is stricken. The defendant never having made any contract to buy exclusively from the plaintiff, this case does not, in my opinion, come within the decision in the case of Continental Wall Paper Co. v. Voight, 212 U. S. 227." The defendant excepted.

POTTLE, *J.*:

We do not find it necessary to discuss at any great length the question whether, conceding the facts alleged in the answer to be true, the plaintiff is an unlawful combination within the meaning of the Federal anti-trust act. The answer was clearly subject to special demurrer. The allegation that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, and was formed for the purpose of monopolizing and restraining trade, is clearly a conclusion of the pleader, and no sufficient facts seem to be alleged to support this conclusion and bring the case within the recent de-
50 cisions of the Supreme Court of the United States in Standard Oil Co. v. United States, 221 U. S. 1 (55 L. ed. 619, 31 Sup. Ct. 502, 34 L. R. A. (N. S.) 834), and United States v. American Tobacco Co., 221 U. S. 106 (55 L. ed. 663, 31 Sup. Ct. 632). But, in view of the fact that there was no special demurrer to the answer, but only a general motion to strike made at the trial term, it may be that, under the practice prevailing in this State, the general averment that the plaintiff corporation was under an unlawful combination and conspiracy in restraint of interstate trade, formed for the purpose of monopolizing such trade, and did in fact result in a monopoly of interstate trade and in greatly advancing the price at which the commodities controlled by the plaintiff were sold, *are* sufficient to show that the plaintiff is an illegal combination, under the Federal anti-trust act. However, as stated above, we made no express ruling on this question.

For the purposes of this case we may concede that the plaintiff is such an illegal combination and conspiracy in restraint of interstate trade as that it would be subject to the penalties imposed by the Sherman anti-trust act. It by no means follows, however, that the defendant can avoid paying for the goods sold by the plaintiff and

consumed by the defendant. In the case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46 L. ed. 679, 22 Sup. Ct. 431), it
51 was expressly ruled by the Supreme Court of the United States that a violation of the Sherman anti-trust act by a combination in restraint of trade, by which a penalty is incurred under the statute, does not prevent the company from recovering under a contract for the purchase price of goods. Mr. Justice Harlan delivered the opinion of the court in that case, saying, among other things, "If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold,—such property not being at the time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress, for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So
52 that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The plaintiff in error relies upon the decision of the Supreme Court of the United States in Continental Wall Paper Co. v. Voight, 212 U. S. 226 (53 L. ed. 486, 29 Sup. Ct. 280). In that case the Continental Wall Paper Company brought suit upon an open account to recover the agreed price of goods sold to the defendant. The defense relied upon was that the plaintiff was an unlawful combination and conspiracy in restraint of interstate trade, in violation of the Sherman anti-trust act, and facts are set forth in great detail in support of this allegation. It appeared that the plaintiff was a combination of a number of smaller companies which had been engaged in the manufacture and sale of wall paper, and that these several companies entered into a written agreement with the Continental Wall Paper Company which the Supreme Court construed to constitute a conspiracy to restrain interstate trade and form a monopoly for the purpose of controlling the manufacture
53 and sale of wall paper, in violation of the anti-trust act. It appeared that it was part of the agreement actually entered into between these various companies that all jobbers and other wholesalers of wall paper should be forced to sign an agreement

binding themselves to purchase their entire stock of wall paper, nominally, either from the plaintiff or from the corporations or firms which had combined to form the large corporation, at the prices fixed by the combination, and that the jobbers and wholesalers should sell only at prices fixed by the seller, under penalty, which the combination of all of the corporations and firms enabled them to enforce, that such jobbers or wholesalers, in case of a refusal to accede to the terms so imposed, or in case of a violation thereof, should be unable to buy wall paper, should be driven out of business, and should sacrifice the good will and capital therein invested. It further appeared that the defendant and every other purchaser of wall paper from the combination or from any one of its constituent companies was required to enter into a written agreement, the substantial terms of which were as follows: The company agreed to sell subject to such credit limitation as it might impose, and the jobber agreed to purchase the entire stock required in his business of selling wall paper, to the amount of a certain gross value, without discounts, the jobber reserving to himself the right to pur-
54 chase such merchandise as he might need in excess of this amount from others. The jobber was allowed certain discounts at rates shown in a schedule accompanying the agreement and made a part thereof. Attached to the agreement was a schedule of "road" prices at which the company agreed to sell its goods for the term embraced in the contract to dealers other than jobbers, and also a statement of discounts allowed to such customers, other than jobbers, for quantity purchases, together with the terms of credit and freight allowance to which such customers were entitled. The agreement further provided: "It is an essential condition of this agreement that the jobber will not, directly or indirectly, sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms that those shown in schedule 'B,' the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company." The prompt performance by the jobber of all the terms of the agreement was made a condition precedent to the exaction of the continuous performance of the agreement by the company. With each order for goods the purchaser was required to sign an agreement "not to sell any of such goods to others on terms better or more favorable than those specified in the above schedule nor lower than said list prices, and our faithful
55 performance of this agreement is a condition precedent to the filing of our order. The intent hereof is to protect you fully against being undersold by us among customers to whom you do allow quantity discounts."

The view of the Supreme Court in that case may best be gathered from the following excerpts from the opinion of the majority, written by Mr. Justice Harlan: "The present case is plainly distinguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing

whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, nor part of nor in execution of any general plan or scheme that the law condemned. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to
56 the property, was precluded by reason alone of its illegal character from having a judgment against the purchaser. We held that the defense could not be sustained, either upon the principles of the common law or under the anti-trust act of Congress. The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme. We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up in execution of the agreements that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several States. The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall
57 Paper Company was organized. If judgment be given for the plaintiff, the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the Connolly case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground merely that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the Connolly case. The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, with the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combina-

tion, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment
58 cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay." The present Chief Justice and Justices Holmes, Brewer, and Peckham dissented, being of the opinion that the case fell within the principle of the decision in Connolly v. Union Sewer Pipe Company; Mr. Justice Brewer being also of the opinion that the defense was not well founded for the additional reason that where a statute created a new offense and denounced the penalty, or gave a new right and declared the remedy, the punishment or the remedy could be only that which the statute prescribed. His view as to this point was thus tersely expressed: "Now, the remedies given in the anti-trust act are three in number: First, a criminal prosecution; second a forfeiture of property; and, third, an action by any person injured to recover threefold the damages by him sustained. These, being the remedies prescribed, are exclusive. The defendant sought neither of these remedies. It was not so anxious for the public welfare as to make complaint
59 and secure criminal proceedings. There was no property to be forfeited. It did not seek to recover threefold the damage it had sustained, but only to avoid paying for the property it had purchased."

This court yields ready assent to any decision of the Supreme Court of the United States involving the construction and effect of a Federal statute. We will give to the decision of that court in the case last mentioned above full scope and effect, but at the same time we cannot bring our minds to agree to the opinion of the majority in that case. On the contrary, we believe that the opinion expressed by the dissenting Justices is the sounder and better view of the law. The Federal courts have exclusive power to decree illegal a combination formed in violation of the anti-trust act. The illegality of such a combination should be determined by a direct proceeding brought for that purpose in the Federal court, in accordance with the procedure and practice in that court, where the corporation assailed has full opportunity to be heard. It ought not to be open to collateral attack in every minor State court where it may bring an action to enforce one of its contracts of sale. In view of the opinion of the Supreme Court of the United States in the Standard Oil Company and American Tobacco Company cases, it is very doubtful whether

that court as now constituted will follow this decision. In the Standard Oil Company case the court, in construing the Sherman act, expressed the following view: "The statute under this
60 view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, undue restraint. * * * Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided." Under this decision the question of the illegality of the combination under the anti-trust act becomes a mixed question of law and fact. It involves a consideration of the details of the business of the alleged unlawful combination, the purposes for which it was formed, the manner in which its business is conducted, and more frequently involves a consideration of complicated facts which ought not to be considered by a jury in a State court, impaneled only to try the question whether a purchaser of goods from a combination should pay for the goods which he has bought and consumed. Suppose, for instance, that the jury impaneled in the case now for decision should determine that
61 the plaintiff is an illegal combination and conspiracy, and that the contract of sale sued on was illegal and void. Another jury, impaneled to pass upon exactly the same issue, in a suit of exactly the same kind might reach an exactly opposite conclusion. Thus, the plaintiff would be in a helpless condition, with its very business life in the balance and compelled to try the issue of its right to exist before every jury impaneled to try the question of its right to recover for goods which it has sold and delivered. We do not believe this to be the law, and we are of the opinion that every consideration of sound policy, and the settled principle of law compel a contrary conclusion. But let us see what the scope and effect of the decision in the case of Continental Wall Paper Co. v. Voight is, and then determine whether the decision reached by the majority of the court in that case compels us to hold that the facts set forth in the defendant's answer in the present case show that the contract sued on is illegal and incapable of enforcement.

In the Continental Wall Paper Company case the defendants were virtually compelled to sign a jobber's agreement which in effect bound them to buy from the plaintiff all the wall paper needed in their business, at certain fixed prices, and not to sell at lower prices or upon better terms than those upon which the plaintiff itself sold to dealers other than jobbers. It appeared that the prices thus agreed on were unreasonable; that the plaintiff had practi-
62 cally a monopoly of the manufacture and sale of wall paper, and that the account was made up, "within the knowledge of

both buyer and seller, with direct reference to and in execution of the agreements which constituted the illegal combination." The court held, in effect, that the defendants in that case were particeps criminis; that, by their contracts they became a part of the illegal combination and conspiracy; that they entered into these contracts for the purpose of furthering the conspiracy; that they knowingly and intentionally became parties to an agreement executed in violation of the anti-trust law. There is no such situation in the case now in hand, and it is clearly distinguishable from that case. The contract between the plaintiff and the defendant in the present case contains but one feature which differentiates it from the ordinary contract of sale. This feature is called the "profit-sharing plan." It is simply nothing more nor less than an agreement on the part of the seller to divide its profit with the purchaser, provided the purchaser will give to the seller his exclusive trade. We do not see how there can be any legal objection to a contract of this nature. Certainly it is not illegal to allow the purchaser a rebate upon the purchase-price on condition that he give the seller his exclusive business. See In re Corning, 51 Fed. 205; In re Greene, 52 Fed. 105 (7).

63 We see no objection from a legal standpoint to a manufacturer of goods offering an inducement of this sort in order to build up his business and secure the exclusive trade of a purchaser. The purchaser is not compelled to buy, and, if he buys, he does so either because he obtains better terms or because he cannot get the character of goods he desires elsewhere. If he violates his agreement and fails to obtain a rebate or discount, he simply pays for the goods what everybody else does who enters into a similar arrangement. While the great object of the Sherman act was undoubtedly to encourage competition, it never was designed to prevent the execution of legitimate contracts made to increase the business of a manufacturer. Indeed, it is very clear, from the latest expressions of opinion by the Supreme Court of the United States, that even though a manufacturer should, by the application of legitimate business methods, secure practically the exclusive sale of a commodity, this alone would not make it obnoxious to the anti-trust act. Certain it is, therefore, that this contract, made with this defendant, standing alone, is not illegal under any principle of law to which we have been referred.

Nor do we think there is anything in the answer which makes the contract illegal. It is alleged that at the time this system of profit-sharing contracts was inaugurated, the plaintiff was the sole

64 corporation in the United States manufacturing glucose and grape sugar, having absorbed all independent and competing concerns. As we have seen, this allegation does not make the contract illegal. It is further averred that the defendants were forced to purchase from the plaintiff glucose or grape sugar upon whatever terms could be made. This allegation does not help the defendant's case. As we have said above, the mere fact that the plaintiff was the exclusive manufacturer of this commodity, and that the defendants were for this reason forced to purchase from the plaintiff, would not

render the contract illegal. The main contention of the defendant seems to be that it was compelled to purchase from the plaintiff for each succeeding year, under penalty of losing the discount allowed under the contract on purchases of the previous year, and that under this system the plaintiff was enabled to maintain a monopoly of the business. We do not understand how this kind of contractual compulsion is obnoxious to the anti-trust act. At the expiration of any contract the defendants were free not to enter into another; they were free not to make further purchases from the plaintiff, and the fact that their refusal to make further purchases simply entailed a loss of the discount, offered upon condition that they would make further purchases, does not render the contract illegal. It is alleged generally in the answer that these contracts were de-
65 signed for the purpose of preventing competition and did in fact have such an effect. Suppose they did. If their terms were legitimate, and there is nothing in the contracts which would make them illegal, the fact that they may have resulted in building up the plaintiff's business to such an extent as to enable it to practically control the sale of the commodity would not render the contracts unenforceable. Indeed, the answer of the defendant in this very case shows that competition has arisen, and that the defendant can purchase the commodity from other concerns, but the defendant alleges it cannot do so, because it would forfeit the discount for the period of one year allowed by the plaintiff. The defendant is at perfect liberty to purchase from these other concerns, and the presumption is that if it does not do so, it is because it can secure more favorable terms from the plaintiff. The contracts of the plaintiff in this case may have the effect of lessening or even destroying competition, but if the methods employed to bring this about are legitimate and not obnoxious to the law, the contracts are not subject to be set aside.

It is further alleged in the answer that each order for goods bought by the defendant contained a clause reciting that the goods are sold "for your own consumption only, and not for resale." A covenant by the buyer of property not to use the same in com-
66 petition with the business retained by the seller has been held to be valid. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, citing Hitchcock v. Anthony, 83 Fed. 799, and American Strawboard Co. v. Holderman Paper Co., 83 Fed. 619. If not valid, it is incapable of enforcement, and does not restrain the purchaser from reselling the goods at his pleasure. Moreover, there is another very clear distinction between this case and the Continental Wall Paper Company case. In that case written agreements between the combining corporations and firms were executed, and showed as clear a case of conspiracy to restrain interstate trade as it would be possible to conceive. And the Supreme Court of the United States held that the contract of sale in that case was made with direct reference to and in execution of the agreements which constituted the illegal combination. No such agreements are alleged in the present case. It is simply averred that the plaintiff was made up by a combination

of a number of manufacturers which were independent competing concerns, and was formed for the purpose of monopolizing and restraining interstate trade. The answer does not set forth any conspiracy agreement, nor does it appear that there was in fact any conspiracy among these constituent companies to restrain interstate trade. But even if such illegal agreements had been entered into by the companies which combined to form the plaintiff corporation, the defendant was no party to such an arrangement; it took part
67 in no conspiracy to restrain interstate trade, and there is nothing in the contract of sale executed by it which shows that it was made for the purpose and as a part of an unlawful conspiracy to restrain interstate trade or commerce. We are quite clear that the trial judge committed no error in striking the defendant's answer in the present case, upon the ground that it set forth no defense to the action. The answer having admitted the purchase of the goods at the price stated in the contract, it was properly stricken and judgment entered in behalf of the plaintiff for the full amount sued for.

Judgment affirmed.

Russell, J., dissents.

68 Court of Appeals of the State of Georgia.

ATLANTA, *October* 2, 1912.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

D. R. WILDER MANUFACTURING CO.
v.
CORN PRODUCTS REFINING CO.

This case came before this court upon a writ of error from the city court of Atlanta; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Russell, J. dissents.

Bill of costs, $10.00.

69 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *November* 29, 1912.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation, together with a true and complete transcript of those parts of the record in the case of D. R. Wilder Manufacturing Company v. Corn Products Refining Company which are required by the præcipe of the plaintiff in error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

Endorsed on cover: File No. 23,450. Georgia Court of Appeals. Term No. 392. D. R. Wilder Manufacturing Company, plaintiff in error, vs. Corn Products Refining Company. Filed December 9th, 1912. File No. 23,450.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 71

D. E. WILSON MANUFACTURING COMPANY,

Plaintiff in Error

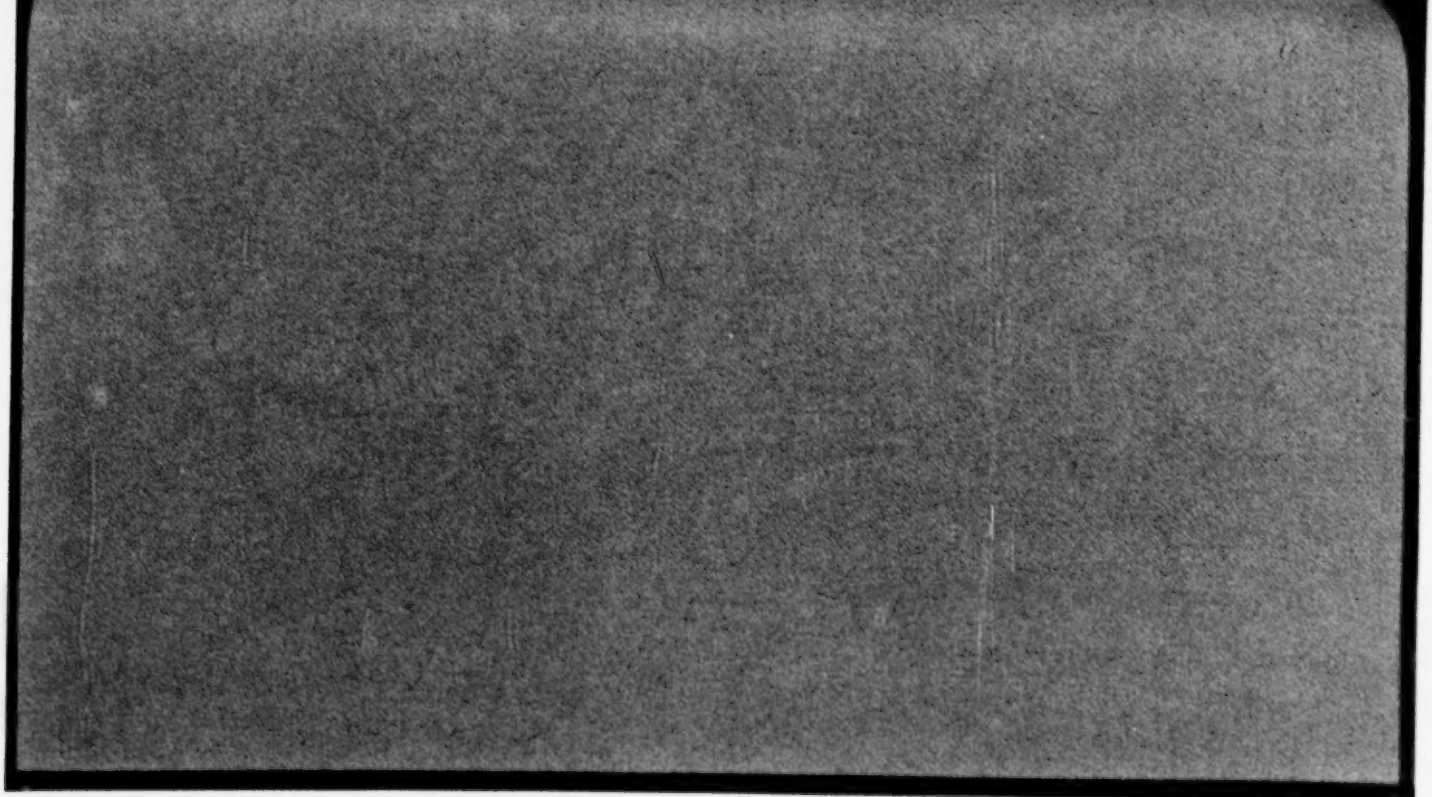
vs.

CORN PRODUCTS REFINING COMPANY,

Defendant in Error

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

(23,450)



IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1913.
No. 392.

D. R. WILDER MANUFACTURING COMPANY,
PLAINTIFF IN ERROR,
vs.
CORN PRODUCTS REFINING COMPANY,
DEFENDANT IN ERROR.

INDEX.

TABLE OF CASES.

STATEMENT OF CASE.

The Corn Products Refining Company brought suit against the D. R. Wilder Manufacturing Company in the City Court of Atlanta upon an open account to recover the purchase price of certain shipments of glucose.

The plaintiff in error filed its answer, in which it admitted the purchases at the price alleged, and plead that the purchase price could not be collected because the purchases were based and were intended by the parties to be based upon agreements which were essential parts of an illegal scheme under the Act of Congress of July 2, 1890, commonly referred to as the Sherman Act.

The defendant in error filed a motion in the nature of a general demurrer to strike the answer as setting out no legal defence, which motion was sustained and a verdict and judgment rendered against the defendant.

On writ of error the Court of Appeals of Georgia affirmed the judgment of the City Court by a divided bench, two of the Judges voting for the affirmance and the third Judge dissenting. (Wilder Manufacturing Company vs. Corn Products Refining Company, 11 Ga. App., 588.) The case, therefore, presents squarely the question of whether the allegations of the answer, if true, are sufficient to constitute a legal defence to the suit under the Act of Congress above referred to.

The defence set out by the answer is briefly as follows:

The defendant in error is a corporation formed by combining certain specified firms, persons and corporations and many others for the purpose and with the effect of creating a monopoly in the manufacture and sale in interstate commerce of glucose and grape sugar, in violation of the Federal Statute. Prior to this merger resulting in the Corn Products Refining Company, the firms, persons and corporations which later went

into the merger had been conducting independent and competing businesses. As a result of the merger such competition was killed, and it became necessary for the plaintiff in error and all other manufacturers consuming glucose to purchase such glucose from the Corn Products Refining Company.

Having thus established itself as practically a complete monopoly, the defendant in error devised and put into effect a certain scheme for perpetuating its illegal monopoly in interstate commerce. This scheme is referred to in the answer as "The Profit Sharing Plan," and consists of a series of contracts entered into between the defendant in error and the consumers of its products, including the plaintiff in error in this case.

These profit sharing contracts were renewed from year to year each being substantially the same. The character of the contracts may be shown by stating the contract between the parties to this case for the year 1906. At the beginning of this year the defendant in error agreed to give the plaintiff in error a certain rebate on all goods purchased by the plaintiff in error from the defendant in error during the year 1906 upon certain conditions, namely, that the plaintiff in error would purchase no glucose from any one but the defendant in error during the year 1906 and during the year 1907. At the end of 1906 the amount of this rebate was credited to the plaintiff in error's account, and the plaintiff in error was advised of the amount of the rebate, but the rebate was not payable until the end of the year 1907 and was payable then only in the event that during all of 1907 the plaintiff in error had given to the defendant in error its exclusive patronage.

At the commencement of the year 1907 a similar contract was entered into with reference to 1907's business, the rebate for which would be credited at the end of 1907, but not payable until the end of 1908, and payable then only in the event the plaintiff in error traded with no one but the defendant in error.

It is specifically alleged in the answer that all sales from the defendant in error to the plaintiff in error were made under these general contracts governing sales between the par-

ties, giving to the plaintiff in error this rebate upon the conditions specified. It is specifically alleged that all sales including those on which suit is brought were made with direct reference to these profit sharing contracts, and were therefore a part of such contracts.

It is alleged that the profit sharing contracts were entered into with practically all consumers of glucose and were for the purpose and actually had the effect of perpetrating the illegal monopoly, which was the fundamental purpose in the formation of the defendant in error.

It is alleged that the defendant in error after establishing its monopoly raised its prices to such an extreme extent that finally shortly before the suit was filed, some slight competition had sprung up.

To further effectuate its illegal monopoly the defendant in error inserted in each invoice, including the invoices for the goods on which suit is brought, the agreement that the goods were sold for the consumption of the purchaser only, and not for re-sale. This provision it is alleged appears in all invoices both to the plaintiff in error and to all other consumers of glucose.

It is alleged that the original combination, the series of contracts known as "The Profit Sharing Plan," the provisions above referred to in the contracts of sale, and the individual sales, including the one on which suit is brought, all constitute elements of one general plan or design, and that this general plan in its entirety constitutes a combination or conspiracy intended and having the effect directly to restrain and monopolize interstate trade and commerce in violation of the Federal Anti-Trust Act of July 2, 1890.

SPECIFICATION OF ERRORS RELIED UPON.

The assignment of errors specifies the fundamental error in the following ways:

—1—

The Court of Appeals erred in sustaining the City Court of Atlanta in holding that the defendant's answer did not set out a good and complete defence, it appearing from said answer that the sales for which suit was brought were directly connected with and a part of certain contracts which were illegal and void and unenforceable under the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

—2—

The Court of Appeals erred in holding that the contracts under which the sales sued for were made were not, under the allegations of the answer, illegal and void and unenforceable under the aforesaid Act of Congress.

—3—

The Court of Appeals erred in holding that under the allegations of the answer a recovery could be had upon the account sued on, it appearing from the said answer that the plaintiff in the City Court of Atlanta was an illegal combination intended and having the effect directly to restrain and monopolize trade and commerce in violation of the aforesaid Act of Congress, and that the account was made up within the knowledge of above parties with direct reference to, and in execution of contracts which had for their object and which had directly the effect to accomplish the illegal ends for which the plaintiff was organized.

—4—

Because the Court of Appeals erred in holding that the City Court of Atlanta did not err in striking the answer of the defendant and in giving judgment for plaintiff because the City Court of Atlanta erred in holding that the contracts between the parties shown by the answer with reference to which and in execution of which the account sued on was made up were not illegal and void, under the aforesaid Act of Congress.

—5—

The said Court of Appeals erred in sustaining the City Court of Atlanta in striking the answer of the plaintiff in error, and in holding that the said answer did not constitute a good and sufficient defence to the plaintiff's suit under the aforesaid Act of Congress approved July 2, 1890.

—6—

The Court of Appeals erred in rendering the aforesaid judgment in that the same is repugnant to and in conflict with the laws of the United States, and especially the aforesaid Act of Congress approved July 2, 1890.

—7—

The Court of Appeals erred in construing the aforesaid Act of Congress as not rendering illegal and void the contract between the parties under which the sales sued on were made, and as not rendering illegal and void and unenforceable the said sales under the said contract.

BRIEF.

The allegations of the answer show the defendant in error to be a combination in restraint of interstate trade in violation of the Federal Statute, it appearing that the combination merged into one corporation various firms and corporations which previously had been competitors, and that the combination was for the purpose and with the effect of restraining and monopolizing such interstate trade. The creation of a monopoly is sufficient to make the restraint unreasonable.

American Tobacco Co. vs. United States, 221 U. S., 106;

Standard Oil Co. vs. United States, 221 U. S., 1.

The corporate organization of the defendant in error can not be used as a cloak to cover the fact that it constitutes an illegal combination.

Northern Securities Co. vs. United States, 193 U. S., 197;

American Tobacco Co. vs. United States, supra;

Standard Oil Co. vs. United States, supra.

The general allegation that the defendant in error is an illegal combination is treated by the Court of Appeals of Georgia as sufficient under the Georgia practice as against a motion in the nature of a general demurrer, although no express ruling as this point was considered necessary, as the Court placed its decision on other grounds.

Wilder Manufacturing Co. vs. Corn Products Refining Co., 11 Ga. App., 588.

A recovery can not be had upon an account for goods sold and delivered by such illegal combination when the goods were sold with direct reference to and in execution of agreements which had for their object and which had directly as their effect the accomplishment of the illegal ends for which the combination was organized.

Continental Wall Paper Co. vs. Louis Voight & Sons Co., 212 U. S., 227.

It is not necessary to show that the contracts under which the goods were sold are expressly violative of the Federal Statute. The illegal intent with which the contracts were made is sufficient to make illegal contracts which appear on their face as no more than ordinary acts of competition.

Nash vs. United States, 229 U. S., 373;

Swift & Co. vs. United States, 196 U. S., 375;

Loewe vs. Lawlor, 208 United States, 274.

A contract of purchase by an illegal combination which together with other similar contracts tends to create a monopoly is void and unenforceable even though the other party to the contract is ignorant of its purpose in this respect.

Brent vs. Gay, 149 Ky., 615; 149 S. W., 915; 41 L. R. A., (N. S.), 1034.

A contract, which though apparently harmless in itself, is in reality a part of a general scheme to violate statutes against the restraint of trade will be held to be illegal.

Continental Wall Paper Co. vs. Louis Voight & Sons Co., supra;

Cravens vs. Carter, Crume & Co., 92 Fed., 479;

Pacific Factor Co. vs. Adler, 90 Cal., 110; 25 Am. St. Rep., 102; 27 Pac., 36;

Fink vs. Schneider Granite Co., 187 Mo., 244; 86 S. W., 213;

Detroit Salt Co. vs. National Salt Co., 134 Mich., 120; 96 N. W., 1.

A contract is illegal where, though harmless on its face, it is one of many similar contracts which collectively have the direct effect of aiding an illegal purpose of restraining interstate trade.

United Shoe Machinery Co. vs. LaChapelle, 212 Mass., 467; 99 N. E., 289.

The scheme must be treated as an entirety.

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211;

Swift & Co. vs. United States, 196 U. S., 375;

Montague & Co. vs. Lowry, 193 U. S., 38;

Loewe vs. Lawlor, 208 U. S., 274.

Illegality may consist in the purpose to accomplish an illegal result though the methods used are not inherently unlawful.

Hanauer vs. Doane, 12 Wall, 342;

Kohn vs. Melcher, 43 Fed., 641;

Mogul Steamship Co. vs. McGregor, L. R., 61; Q. B. Div., 285; [1892] A. C., 25;

Clark on Contracts, 478 et seq.

Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect.

Hall vs. Coppell, 7 Wall., 542;

Armstrong vs. Toler, 11 Wheat., 258;

Embrey vs. Jemison, 131 U. S., 336.

One of the parties can not maintain an action on the valid part of the contract discarding or omitting to prove the portion that is illegal.

McMullin vs. Hoffman, 174 U. S., 639.

The Continental Wall Paper Co. case is authority for the proposition that when the sales are made under and with reference to an illegal agreement, and the plaintiff sues on the sales, the defendant may thereupon plead the illegal agreement of which the sales are a part.

See also:

Oscanyan vs. Winchester Repeating Arms Co., 13 Otto, 261.

The cases relied upon by the defendant in error can be distinguished from the case at bar.

For example Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, which is especially stressed by the defendant in error decided only that an illegal combination was not by reason alone of its illegal character prevent it from collecting for goods sold.

The Continental Wall Paper Co. case points out this difference between the Connally case and cases such as the one at bar.

The defendant in error cites authorities to prove that the agreement between the parties standing alone is not inherently illegal. It does not, however, stand alone but it shown by the answer to be one of the effective means of accomplishing the illegal purpose of the combination.

If any of the cases urged by the defendant in error go to the extent of holding that this is not sufficient to make the agreement illegal, they are in conflict with the decisions of this Court.

Nash vs. United States, 229 U. S., 373;

Swift & Co. vs. United States, 196 U. S., 375;

Loewe vs. Lawlor, 208 U. S., 274.

The case of Bank vs. Glass & Co., 169 Mo. App, 374, is not in point because (1) it did not appear that the plaintiff had established any substantial monopoly, and (2) the "commission agreement" in that case was not alleged as being a method of restraining competition, and, therefore, illegal.

The case of Bessire & Co. vs. Corn Products Manufacturing Co., 47 Ind. App., 313, is in conflict with the decisions of this Court on two points, namely, in holding that the legality of the plaintiffs' organization could only be questioned in a direct proceedings by the government, and second, in holding that where the plaintiff could make out its case without reference to illegal agreements, the defendant could not thereupon plead and prove them.

There is nothing to distinguish this case from the Continental Wall Paper Co. case, and the decision then rendered is controlling.

ARGUMENT.

The case of the Continental Wall Paper Company case vs. Louis Voight & Sons Company, 212 U. S., 227, is controlling.

The above case and the case of Connolly vs. the Union Sewer Pipe Company, 184 U. S., 540, presents the conclusions reached by this Court relative to the rights of combinations in restraint of trade with reference to the enforcement of their contracts.

The case at bar must be decided with reference to whether it falls within the rule of the Connally case, or whether it is within the rule of the Continental Wall Paper Company case. It is, therefore, essential to determine exactly what the Court held in these two controlling decisions.

In the Connolly case the defence asserted was that the plaintiff was a combination in restraint of trade. It did not appear that the sales on which suit was brought were in any way connected with the illegal organization or with the illegal purpose of the Union Sewer Pipe Company. In discussing the case, Mr. Justice Harlan in the Continental Wall Paper Company case says: "His contract was to take certain goods at an agreed price, and was not in itself illegal, nor *a part of, nor in execution of any general plan or scheme that the law condemns.*" The italics is by the Court.

In the Continental Wall Paper Company case the majority opinion states what was ruled in the Connolly case as follows: "In short the defence in the Connolly case was that the plaintiff corporation, although owning the pipe in question, and having authority to sell and pass title to the property, was prohibited by reason **alone** of its illegal character from having a judgment against the purchaser. We held that that defence could not be sustained, either upon the principles of common law, or under the Anti-Trust Act of Congress."

The Continental Wall Paper Company case also presents a case of a combination in restraint of trade seeking to enforce the collection of the purchase price of goods sold. If that had been the only fact presented by the defence, it would clearly have been within the ruling in the Connolly case. Another element entered into the situation presented by this latter case, namely, that there was a direct connection between the sales sued on, and the illegal ends for which the plaintiff was formed. It was this connection which in the opinion of this Court distinguished the two cases, and prevented a recovery of the purchase price of the goods by the Continental Wall Paper Company, whereas in the Connolly case a recovery had been allowed.

In holding that a contract directly connected with an illegal scheme could not be enforced, this Court announced no novel principle of law. The same doctrine had been applied in Hanauer vs. Doane, 12 Wall., 342; McMullen vs. Hoffman, 174 U. S., 639; Coppell vs. Hall, 7 Wall., 542; Embrey vs. Jemison, 131 U. S., 336; and in other cases, and is old in American and English Law.

The vitally important point ruled in the Continental Wall Paper Company case is found in the consideration of the facts which were held to be sufficient to establish a direct connection between the sales and the illegal purpose of the combination.

Analyzing the facts of that case, it appears that while the defendants are spoken of as members of the combination, they were not members as sellers, but were members as buyers. They were not in any sense beneficiaries of the illegal combination, but were rather sufferers from it. In their relations to the combination, they were always in the attitude of buyers, and the combination in the attitude of seller. The statement in the opinion, therefore, that Louis Voight & Sons Company were members of the combination is to be understood in connection with these facts as its explanation.

There was, however, a connection, otherwise the case would have been decided on authority of the Connolly case.

That connection consisted in a contract between the Continental Wall Paper Company as seller, and Voight & Sons Company as buyers, with reference to which the particular sales were executed, and which had for its purpose the accomplishment of the illegal purpose of the corporation, being similar to other contracts executed with jobbers over the country as a whole. We believe the case will be considered in vain for any other connection, and that there is no escape from the conclusion that this was held to be a sufficient connection to invalidate the sales.

It is not held in the Continental Wall Paper Company case that the connecting contract between the buyer and seller contained any provisions which expressly and on their face violated the Sherman Act. Such contracts were held to be illegal because, in the language of the Court, they "had for their object . . . . . and had directly the effect to accomplish the illegal ends for which the Continental Wall Paper Company was organized." The agreements are spoken of in another place as being contracts "by means of which the combination proposed to accomplish the forbidden ends."

We may, therefore, state the elements which were held in the Continental Wall Paper Company case to render the sales illegal as follows:

1. That the plaintiff is an illegal combination in restraint of trade.

2. That there is a contract between the parties with reference to sales, which has for its purpose and effect the accomplishment of the illegal purpose of the combination.

3. That the sales are made within the knowledge of both buyer and seller with direct reference to and in execution of the illegal agreement.

It is respectfully submitted that each of these elements clearly appears in the answer of the plaintiff in error in the case at bar.

The defendant in error is an illegal combination in restraint of interstate trade.

There can be no serious question but that the answer of the plaintiff in error sufficiently shows this proposition. It is probable that some of the allegations would have required amplification as against a special demurrer, but no special demurrer was filed, the controlling ruling of the Court being made on a motion to strike the answer, which motion is in the nature of a general demurrer.

The answer shows that the defendant in error is a corporation formed by certain named manufacturers of glucose and many others, which before the formation of the plaintiff Company were independent and competing manufacturers.

It shows that the combination was for the purpose of monopolizing and restraining interstate trade in the products handled by the defendant in error, and that it did result in a monopoly of interstate trade, and in greatly enhancing the price at which commodities were sold. The answer alleges that for a while at least, the combination was successful in its illegal purpose, to the extent that it maintained an absolute monopoly, and that it advanced the price of its products to a large extent. All of these allegations are admitted for the purpose of the motion under consideration. While a special demurrer might have required amplification in some of the statements, they are not conclusions of law, but are statements of fact, and are admitted for the purpose of the motion in the nature of a general demurrer which the Georgia Courts sustained.

It cannot be questioned, under the decisions of this Court, that these facts if true constitute the defendant in error an illegal combination in violation of the Anti-Trust Act. Either the purpose to create a monopoly or unreasonably increase prices is sufficient to render the restraint of trade unreasonable, and, therefore, illegal. The law on the subject is now so clearly established that extended discussion would be superfluous.

American Tobacco Co. vs. United States, 221 U. S., 106;

Standard Oil Co. vs. United States, 221 U. S., 1.

The so-called profit sharing contracts have for their direct purpose and effect the restraining and monopolizing of interstate commerce.

It is positively alleged in the answer that the purpose of these agreements was to effectuate the illegal purpose of the combination as to the restraint of interstate trade. It is alleged that the effect and operation of the series of contracts was to restrain and monopolize interstate trade. These are not conclusions of law, but are statements of fact, which are admitted by a motion in the nature of a general demurrer.

For the purpose of considering the ruling of the Court on this motion, we could rest the case on this proposition. It is not, however, necessary to do so. The allegations of the answer and the contracts themselves disclose the details of a very adroit and far-reaching scheme, affecting all the trade, which was well adapted to accomplish the illegal purpose alleged.

The Court will also bear in mind that the provision in each invoice that the goods covered by it were only for consumption by the purchaser and not for re-sale, was also a part of the contractural relation between the parties.

This contractural relation embodied, therefore, first, the provision that the goods should under no circumstances be resold, which has just been stated, and second, under the profit sharing contracts an elaborate scheme by which the purchaser must continue to trade exclusively with the defendant in error, or forfeit a large amount of rebates accrued on past transactions.

Let us illustrate the operation of this plan: Suppose a purchaser traded with the defendant in error during the year 1906. At the end of that year such purchaser would be cred-

ited with a large rebate on all sales made during that year. This rebate, however, would not be paid to the purchaser then, but he would be advised that it would only be paid to him at the end of the year 1907, and would be payable then only in the event that during the year 1907 also he had given to the defendant in error his exclusive trade. During the year 1907 the same process would be in operation with reference to that year's business. At the end of 1907, the purchaser, if he had continued to trade exclusively with the defendant in error, would be paid his 1906 rebate, and would be credited with his 1907 rebate, but this rebate for the latter year would be payable to him only at the end of the year 1908, and provided always that he had continued during the year 1908 to give to the defendant in error his exclusive trade. So that at all times the purchaser was placed in a position where if he gave a single order to any competitor of the defendant in error (if attempted competitors sprang up) he would instantly forfeit at least a whole year's rebate, and also that part of the current year's rebate represented by the portion of the current year which had elapsed.

The Court will bear in mind that the answer alleges that at the time this system was adopted the defendant in error by combining all of the manufacturers of glucose in the United States of sufficient importance to be considered, had created a monopoly, and was itself for all practical purposes the only seller of this commodity. It is specifically alleged in the answer that the plaintiff in error and all other purchasers were because of this situation forced to commence trading with the defendant in error, and thereby came under the operation of this series of contracts. Can it be doubted that the only purpose of this scheme was to place all purchasers of glucose in such a position that if they failed to trade exclusively with the monopoly, the first break would be attended by a great financial sacrifice?

When competition first sprang up, the purchaser might well doubt whether it would be successful or continue. If he traded with the competitor he at once sacrificed his accrued rebates with the monopoly. That was certain, while the continuation of competition was uncertain. Conceding the exist-

ence of a complete monopoly, as is alleged in this answer, it may well be doubted whether a more adroit scheme could be devised for ~~perpetrating~~ perpetuating its illegal existence. The answer alleges the complete success of the scheme until the prices were advanced to a point so exorbitant that even this scheme was not successful to prevent some competition from arising.

The Court will bear in mind that as in the Continental Wall Paper Company case, this question arises on a general demurrer, and all of these allegations must be taken as true.

It is, therefore, clear that for the purpose of this hearing it must be considered as admittedly true that the contract between the parties with reference to sales had for its purpose and effect the restraining and monopolizing of interstate trade, and was one of a series of contracts with all purchasers which accomplished this result.

We have not discussed whether the provisions of the contracts are on their face violative of the statute, but will discuss later in the argument the proposition on which we rely that the illegal purpose which they accomplished is sufficient to render them illegal.

The sales were made within the knowledge of both buyer and seller with direct reference to and in execution of the illegal agreements.

This is clearly alleged in the answer, and an elaborate discussion of it would be superfluous. The allegations are specific and are admitted for the purpose of the hearing. Indeed since the parties had made a contract which related to all sales between them, it necessarily follows that when the sales themselves were made, they were with reference to and in execution of the contract.

The covenant against re-sale was repeated in each invoice.

Analysis of decision of the Court of Appeals of Georgia.

A study of the opinion of the majority of the Court of Appeals discloses that the Court was unconsciously influenced

by the belief of the two members who constituted the majority of the Court that the dissenting opinion of one of the Justices in the Continental Wall Paper Company case presented the sound rule. We quote from the opinion of the Court of Appeals of Georgia as follows:

> "This Court yields ready assent to any decision of the Supreme Court of the United States involving the construction and effect of a Federal statute. We will give to the decision of that Court in the case last mentioned above full scope and effect, but at the same time we can not bring our minds to agree to the opinion of the majority in that case. On the contrary, we believe that the opinion expressed by the dissenting Justices is the sounder and better view of the law. The Federal Courts have exclusive power to decree illegal a combination formed in violation of the anti-trust act. The illegality of such a combination should be determined by a direct proceeding brought for that purpose in the Federal Court, in accordance with the procedure and practice in that Court, where the corporation assailed has full opportunity to be heard. It ought not to be open to collateral attack in every minor State Court where it may bring an action to enforce one of its contracts of sale. In view of the opinion of the Supreme Court of the United States in the Standard Oil Company and American Tobacco Company cases, it is very doubtful whether that Court as now Constituted will follow this decision."

We do not believe that it is anything in the decisions in the Standard Oil and American Tobacco Company cases, which sustains the theory stated by the Court of Appeals of Georgia, that the illegality of the combination can be determined only by direct proceedings brought for that purpose in a Federal Court. In the Continental Wall Paper Company case, while four Justices dissented, only one of them based his dissent on this ground, and it is, therefore, a fair inference that the other three dissenting Justices, as well as the majority of the Court, did not concur with the views on this point of the fourth dissenting member of the Court.

The distinction which the Court of Appeals of Georgia made between the case at bar and the Continental Wall Paper Company case is based on the theory that in the case at bar the contracts between the parties are not in themselves and on their face illegal, and that even if they were used to accomplish the illegal purpose of the combination, they would not, therefore, become illegal. We quote from the opinion as follows:

> "It is alleged generally in the answer that these contracts were designed for the purpose of preventing competition, and did in fact have such effect. Suppose they did. If their terms were legitimate, and there is nothing in the contracts which would make them illegal, the fact that they may have resulted in binding up the plaintiff's business to such an extent as to enable it to practically control the sale of the commodity would not render the contracts unenforceable."

In another part of the opinion, the Court says:

> "The contracts of the plaintiff in this case may have the effect of lessening, or even in destroying competition, but if the methods employed to bring this about are legitimate and not obnoxious to law, the contracts are not subject to be set aside."

We believe these quotations make very clear the exact point on which the majority of the Court of Appeals decided against us. It is not denied by that Court that the answer sufficiently shows that the defendant in error is an illegal combination; it is not denied that the contracts under which the sales were made are shown to have been for the purpose and effect of accomplishing the illegal purpose of restraining trade; it is not denied that the sales were made with direct reference to these agreements.

It is, however, decided by the Court of Appeals that if the terms of the contracts are legitimate, and if there is nothing in the contracts themselves which would make them illegal,

they can not be attacked as illegal, because they were for the purpose and effect of accomplishing an illegal restraint of trade.

The proposition on which the Court of Appeals based its decision is in conflict with the decisions of this Court.

The case of Nash vs. United States, 229 U. S., 373, is in direct conflict with the proposition quoted above from the Court of Appeals. In that case this Court said:

> "An unlawful intent may be sufficient to convert what on their face might be no more than the ordinary acts of competition, or the small dishonesties of trade into a conspiracy forbidden by the Anti-Trust Act of July 2, 1890."

In Swift & Company vs. United States, 196 U. S., 375, this Court said:

> "It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. Aikens vs. Wisconsin, 195 U. S., 194. The statute gives this proceeding against combinations in restraint of commerce among the States, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen."

See also Loewe vs. Lawlor, 208 U. S., 274, and Aikens vs. Wisconsin, 195 U. S., 194.

In the last case the Court says:

> "The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

The opinion of the Court of Appeals of Georgia that the Court is limited to the provisions of the contracts themselves and can not consider the purpose for which they were adopted, nor ends which they accomplished, is necessarily in conflict with the decisions of this Court which hold that in all inquiries of this character, the scheme must be treated as an entirety.

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211;

Swift & Company vs. United States, 196 U. S., 375;

Montague & Company vs. Lowry, 193 U. S., 38;

Loewe vs. Lawlor, 208 U. S., 274.

The decision of the Court of Appeals in this respect is also in conflict with the Continental Wall Paper Company case. The decision in that case is not based on the proposition that the contract under which the sales were made was unlawful on its face. On the contrary, the decision is based on the ground that the contract was unlawful because it was a means of accomplishing the illegal purpose of the combination.

Other authorities to the same effect.

While the decisions of this Court above cited are conclusive, we desire to point out also that there are many well considered cases of other Courts which hold squarely that a contract harmless on its face is illegal if it is one of the means by which an illegal purpose is accomplished. We are discuss-

ing this point fully because the Court of Appeals of Georgia held otherwise on it, and made its ruling to the contrary, the basis of its distinction between the case at bar and the Continental Wall Paper Company case, and the basis of its decision adverse to the plaintiff in error.

In the case of Cravens vs. Carter-Crume & Co., 92 Fed., 479, the Circuit Court of Appeals for the sixth circuit, (Judges Lurton, Severens and Clark) held that the contract under consideration in that case was not illegal in itself, but that since it was a part of an illegal scheme to defraud, it became illegal. The Court said:

> "It was argued by counsel for the plaintiff, that the contract should be sustained within the principle stated and approved in United States vs. Addyston Pipe & Steel Company, upon the theory that the contract upon which the action is based was collateral merely, and did not require the aid of agreements for combinations. But it seems clear to us that this proposition can not be sustained. This contract was one of the steps in the forbidden organization, and was intended to be one of many by which the objects of the corporation were to be accomplished."

In the case of Fink vs. Schneider Granite Company, 187 Mo., 244; 86 S. W., 213, the Court adopted the following statement from the report of the Referee:

> "If the contract in suit stood alone, it would undoubtedly be sustained, but it did not stand alone. It was one of five others, all of which were links and necessary links, in the illegal combination which rendered them illegal."

The following cases are directly in point:

> Pacific Factor Co. vs. Adler, 90 Cal., 110; 23 Am. St. Rep., 102; 27 Pac., 36;

Detroit Salt Co. vs. National Salt Co., 134 Mich., 120; 96 N. W., 1;

United Shoe Machinery Co. vs. LaChappell, 212 Mass., 467; 99 N. E., 289.

It is immaterial whether the showing of illegality comes from the plaintiff or the defendant.

The defendant in error argued in the Court of Appeals of Georgia that since it could make out its case without proving the illegal agreement, the present case was distinguished from the Continental Wall Paper Company case.

While the Court of Appeals of Georgia did not comment on this proposition, it is probably well to refer to it, in view of the fact that there is a recent State decision from the Court of Appeals of Indiana, which attempts to make the same distinction. In Bessire & Company vs. Corn Products Manufacturing Company, 47 Ind. App., 313, the Indiana Court of Appeals considered a case presenting some facts similar to the one at bar. The Court in that case held that as the plaintiff could make out its case without referring to the illegal agreements, the case could be distinguished from the Continental Wall Paper Company case, and the defendant would not be allowed to plead and prove that the sales were a part of illegal agreements. The Court also held that the legality of the plaintiff's organization could only be questioned in a direct proceedings brought by the Government.

Both of these propositions are in conflict with the decisions of this Court. The latter has already been discussed in another part of this brief.

With reference to the first proposition, it is sufficient to say that this Court in repeated decisions has held that it is immaterial whether the evidence of illegality comes from one side or the other. Its disclosure from either side is fatal to the plaintiff's case.

Hall vs. Coppell, 7 Wall., 542;

Armstrong vs. Toler, 11 Wheat., 258;

Embrey vs. Jemison, 131 U. S., 336;

McMullen vs. Hoffman, 174 U. S., 639;

Oscanyan vs. Winchester Repeating Arms Co., 13 Otto., 261.

In the case of Embrey vs. Jemison, supra, suit was brought on a note, and the Court allowed the defendant to plead and prove that the note was given for an immoral consideration, namely, for a gambling consideration. It is obvious that in that case the plaintiff could make out his case simply by proving the note, and that it was necessary for the defendant to plead and prove the illegality. The case is directly in point, and is controlling.

In the case of McMullen vs. Hoffman, supra, suit was brought on a written contract which appeared to be legal. The plaintiff could prove his case by reference only to the legal contract. The defendant was allowed, however, to show that it was connected with a verbal contract which was contrary to public policy, and that the whole arrangement was, therefore, illegal.

The proposition is settled law by the decisions of this Court.

The defence is allowed on the grounds of public policy, and not to protect the defendant. If the Court were seeking to protect the defendant, it would probably have established a rule allowing a credit for the excessive charges extorted by the monopoly, as the rebate is probably nothing but a return of such excessive charges. The rule, however, based on public policy is necessarily broader and refuses the aid of the Court in any matter connected with the illegal agreement.

It is therefore respectfully submitted that this case is controlled by the decision of this Court in the Continental Wall Paper Company case, and that the principles on which that case rests are established by many other decisions of this Court.

Respectfully submitted,

MARION SMITH,

For Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 71

D. R. WILDER MANUFACTURING COMPANY,

Plaintiff in Error

versus

CORN PRODUCTS REFINING COMPANY,

Defendant in Error

REPLY BRIEF OF MARION SMITH

for Plaintiff in Error

(23,450)

Supreme Court of the United States

D. R. WILDER MANUFACTURING COMPANY,
Plaintiff in Error,
versus
CORN PRODUCTS REFINING COMPANY,
Defendant in Error.

No. 392,
October Term, 1913.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

This case was reached for argument last Spring, and was continued until the present October Term on account of the illness of the counsel for the defendant in error. Prior to the time it was reached last Spring, we filed our brief for the plaintiff in error, as provided by the rules of Court. The brief for the defendant in error was served upon us on the ninth of October, 1914.

In this brief for the defendant in error, the legal theory on which the position of the defendant in error was sustained by the majority of the Court of Appeals of Georgia appears to be entirely abandoned, and an entirely new theory is advanced in support of that side, which is not only different from the decision of the Court of Appeals of Georgia, but is conflicting with many things either held by that Court or assumed without express decision.

In the brief of the counsel for the defendant in error, two propositions are asserted:

1. That the answer does not set out sufficient facts showing the defendant in error to be a combination violative of the Sherman Act on account of its restraint of interstate trade.

2. That no contract of any kind existed between the parties either as to (a) the profit sharing plan, or (b) the covenant against re-sale.

—1—

The first proposition proceeds on the theory that our answer alleges simply the general conclusion that the defendant in error is an illegal combination in restraint of trade. If this assumption were correct, it would raise an interesting question as to how far this general conclusion of fact is admitted by a motion to strike the answer in the nature of a general demurrer. As, however, this assumption is not correct, it is unnecessary to discuss this question, or the cases which are cited with the claim that they support it.

The answer alleges the following matters with reference to this point:

1. That the defendant in error is a corporation formed by the consolidation of certain named Companies and other firms and corporations.

2. That before the consolidation of the said firms and Companies into the corporation which is the defendant in error, each of said firms and corporations were independent and competing manufacturing concerns manufacturing glucose and grape sugar, glucose being the kind of goods for the purchase price of which this suit is brought.

3. That the purpose of said combination was to restrain and monopolize interstate commerce in said commodities.

4. That this purpose was carried out successfully by the establishing of a complete monopoly, and that at the time the profit sharing contracts were issued, the defendant in error by this combination had so completely monopolized the industry that it was the only person, firm or corporation in the United States manufacturing and selling glucose.

5. That the combination after establishing the monopoly greatly and exorbitantly enhanced the price at which its commodities were sold.

None of the above propositions are stated as conclusions of law, but as specific allegations of fact. It is conceded that they might have been stated in greater detail. It is probably true that an appropriate special demurrer would have required some of them to be amplified, but it cannot be held that they are not sufficiently alleged as against a motion in the nature of a general demurrer, nor can it be denied that these facts, if true, constitute the defendant in error an illegal combination in violation of the Sherman Act. Both the Standard Oil Case and the American Tobacco Company Case proceed upon the theory that a restraint of trade is necessarily unreasonable, and, therefore, violative of the Federal Act, where it has as its purpose and effect monopolizing the industry or enhancing prices. The answer in this case alleges as specific allegations of fact that the result of the combination was to establish a total monopoly, and to greatly enhance prices.

The injustice of allowing a motion to strike the answer to serve the purpose of a special demurrer is illustrated by the present case, should such a conclusion be reached in the present case. Had an appropriate special demurrer been filed calling for a more detail statement on any of these propositions, we could have met it by an appropriate amendment before a final judgment was rendered. If, however, the motion to strike is allowed to fulfil this function of a special demurrer, it will result in a final judgment being rendered on that account when no notice has been given by any appropriate pleading that a more detail statement in any of these respects is required.

It is also to be observed that the Court of Appeals of Georgia does not base its decision on the ground that our answer is not sufficient under the Georgia practice as against a general motion to strike. While the Court criticises the answer for not going sufficiently into detail, it expressly assumes the allegations in this respect to be sufficient for the purpose of its decision, and bases its decision squarely on the interpretation of the Federal Anti-Trust Act, which is discussed in our brief. The Court says:

promisor is relieved, because that is the condition of the contract, but the contract is binding when it is made upon a sufficient consideration. It is none the less a contract because conditions are attached to it.

The whole doctrine of mutuality in contracts is one of consideration. Thus in Page on Contracts, Section 302, the rule is stated as follows:

> "The principles which control in determining the validity of a promise as a consideration are substantially the same as those which apply to consideration in general. The promise must be such as to offer a legal right or the forbearance of a legal right to which the promisor would not otherwise have been entitled. On the one hand, it is not necessary that the contract, if in writing, be in one instrument in order to be mutually binding. The agreements may be in two separate written instruments, even though executed on different days if in fact a part of the same transaction; or the agreement may be written on the one side and oral on the other.
>
> *"Neither is it necessary that each covenant on the one part have a corresponding obligation on the other, apportioned to that particular covenant, since one consideration can support several promises. Thus, where as part of the lease, lessor agreed to give lessee sixty days' notice of an intended sale, and to give him the first opportunity to purchase, such promise is valid though lessee did not agree to buy. So if A buys a certain lot of logs from B with a privilege of taking another amount at a specified price, a consideration for the contract exists.*
>
> "On the other hand, if the promise offers only what the promisor is already entitled to, there is no consideration. So if a promise does not offer any enforceable legal right or forebearance it is not a consideration. This principle is sometimes expressed in the rule

that promises, in order to be valid consideration each for the other, must be mutual."

(The italics are by us.)

Many familiar illustrations of this could be suggested. A sale of land might be made with a provision in the contract that the seller shall have the right to re-buy within a certain time at a certain increased price, and although the seller is not bound to re-buy no Court would deny that the option is binding on the purchaser. A sale might be made with a provision that the purchaser should have a right to a rebate in the purchase price at the end of the year, provided he performed certain services for the seller, which it was optional with him to perform or not under the contract. In such an instance, the seller could not compel the performance of the services, but his contract to rebate a part of the purchase price would unquestionably be binding on him, if the purchaser complied with the conditions. Many other familiar illustrations could be given.

Counsel for the defendant in error say: "To test the soundness of counsel's argument, it is asked whether at the time of the purchase in question the plaintiff in error was bound to the defendant in error to either do or not to do any specific act." We respectfully submit that to apply such a test in the present case would be to disregard elementary conceptions of the law of contracts. Where the sole consideration for a promise is a promise of the opposite party this test is appropriate. Where, on the other hand, there is an executed consideration (as in the case at bar the purchase of goods being the executed consideration for the promised rebate, upon the conditions specified in the promise of rebate) the test is not appropriate. Thus in Clark on Contracts, page 169, the author quotes with approval from L'Amoreux vs. Gould, 7 N. Y. 349, the following with reference to cases where the want of mutuality destroys a contract: "It is confined to those cases where the want of mutuality would leave one party without a valid or available consideration for his promise."

A good illustration is furnished by the case of Joy vs. the City of St. Louis, 138 U. S. 1. For an adequate consideration, a Railroad Company agreed to permit another Company to use its right-of-way on certain terms. It was objected that this promise was void for lack of mutuality, in that the other Company had not accepted the privilege, and was not bound to use the track and comply with the terms stated in the agreement. The eighteenth head note is as follows:

> "A contract by one railroad company to permit other railroad companies to use its right of way does not lack mutuality, where the consideration is ample, and such company cannot resist the enforcement of the privilege on the ground that it cannot compel the other company to continue in its enjoyment."

The question is whether the exclusive trade of the purchaser for the time mentioned in the offer is a condition precedent to the beginning of the contract or a condition precedent to the maturity of the promise. Instead of the test submitted by counsel, we suggest the following test: Suppose the purchaser in reliance upon this promised rebate commences giving his exclusive trade to the vendor. Suppose at the expiration of six months of exclusive trade in 1909 the vendor should notify the purchaser that it had determined to withdraw its promised rebate upon past trades. Can it be doubted that the purchaser could appropriately reply that it had accepted the offer by trading exclusively with the vendor for six months, and that it had a contract right to this rebate upon the condition specified in the contract, to-wit, that it continue giving its exclusive trade to the vendor for the specified period? We believe there can be but one answer to this question. The purchases by the plaintiff in error accepted the offer. Thereupon arose a contract, to pay this rebate upon the compliance with the conditions specified, the purchases furnishing the consideration for the contract. It is distorting the real relationship of the parties to say that these conditions must be complied with before any contract arises. The contract arises when the first purchase under the offer is made, and the conditions are merely a part of the contract.

The only authority cited by counsel for the defendant in error to this proposition is the case of **Georgia Cane Products Company vs. Corn Products Refining Company, 141 Ga. 40.** The case is cited as presenting a substantially identical state of facts, and as holding that a similar profit sharing arrangement did not constitute a contract. Counsel appear to construe the decision as holding that the profit sharing arrangement involved in that case was not a contract, because the purchaser had not accepted it. The case, however, is wholly different from the case at bar; the profit sharing arrangement involved in that case is different in one vital particular; and the Court's opinion is based on a different reason from that argued by counsel.

The pleas of the defendant in the Georgia Cane Products Company case as to the Sherman Act were abandoned and not presented to the Supreme Court of Georgia. The only question presented to that Court was the claim of the defendant for a set-off equal to its rebate claimed under its profit sharing arrangement for 1910. The answer in that case alleged that a definite rebate was offered for each year up to 1910, but that no offer was made for 1910, but that an assurance was made that the profit sharing arrangement on some indefinite basis would be continued for 1910.

The Court held there was no contract between the parties for 1910, not because, as suggested in this case, the purchaser had not accepted the offer, but because, as the Court clearly points out, no definite offer had been made by the vendor. As the Court says: "The defendant alone cannot make one [referring to a contract.]" The Court's position is too clearly sound for argument. Of course a contract for a rebate must specify the amount of the rebate or it is meaningless, and an offer that is meaningless, no matter how definitely accepted can not make a contract. The case, however, has no bearing whatever on the position urged by counsel for the defendant in error, but involves a totally different question.

In the case of **Storm vs. United States, 94 U. S. 76,** this Court says:

> "Agreements are frequently made which are not, in a certain sense binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties."

With reference to such a contract involved in that case the Court says:

> "Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same to say, that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have, in fact, been performed in good faith and without prejudice to the defendant."

The performance either whole or partial furnishes a consideration for the contract, although, of course, the liability of the other party could not be enforced until the conditions of the contract are fulfilled.

As bearing generally on the subject, reference may be made to the following cases:

> Sheffield Furnace Co. vs. Hull Coal & Coke Co., 101 Ala. 446;
>
> Fontain vs. Baxley, 90 Ga. 416;
>
> Cooper vs. Lansing Wheel Co., 94 Mich. 272.

A familiar class of cases involving this question are those presenting substantially the following situation: Real estate is placed with a real estate broker for sale under an agreement giving to the broker an exclusive right of sale for a certain length of time, or providing that if sold by the owner for a certain period the broker is to have his commission. In these cases where no immediate consideration passes, it is obvious that at the time of the delivery of the writing the broker is not required to perform any service, and, therefore, at that time no binding contract has been formed. When,

however, the broker proceeds to spend either his time or his money in an effort to sell the property, a consideration for the contract is furnished, and the owner cannot withdraw from it during the period, even though no purchaser has actually been found.

Attix vs. Peland, 5 Ia. 336;

Lapham vs. Flynt, 86 Minn. 376;

Metcalf vs. Kent, 104 Ia. 487;

Kimbrell vs. Skelly, 130 Cal. 555;

Hoskins vs. Fogg, 60 N. H. 402.

An interesting case in this connection is **Goward vs. Waters, 98 Mass. 596,** in which the Court says:

> "The position of the defendant's counsel is undoubtedly true, that at the time the contract was signed it was a mere nudum pactum. The plaintiffs paid nothing, incurred no expense or loss, and entered into no obligation on their part. They were at liberty to act or not, as they pleased; and would incur no liability by failing to do anything. But it is also apparent that the writing contemplated services to be rendered and expenses to be incurred by the plaintiffs for the defendant; and that the promises were made in view of such future services and expenses. The writing is merely a stipulation, by the defendant, of the terms upon which compensation shall be made by him. Subsequent performance of services and expenditure of money, in prosecution of the employment thus authorized, furnish a sufficient consideration for the promises of the defendant."

The principles established by the authorities herein cited when applied to the facts of this case require the conclusion that when under the offer made to the plaintiff in error it commenced giving its 1909 trade to the defendant in error, it ac-

cepted the proposition and furnished a consideration for the contract. The contract was, of course, conditioned on its continuing to give its exclusive trade, and if it failed to do so the promise of the defendant in error never matured, but the contractural relation came into existence when the trading commenced, and from then on the defendant in error could not withdraw from its promise, except upon a breach of the condition which entered into the existing contract of the parties.

The brief of counsel for the defendant in error also argues that the covenant against re-sale is not a part of the contract because it is expressed in an invoice, and counsel argues that an invoice is not a contract of sale.

As a matter of fact, the answer does not allege that the covenant was expressed in an invoice, but alleges that it is expressed in each "contract of sale," so counsel's argument is not applicable to the facts in this case.

We are probably responsible for this mistake, as in our brief we inadvertedly referred to this covenant as appearing in an invoice instead of using the expression "contract of sale," which appears in the answer.

As a matter of fact, however, it is entirely immaterial as to the name applied to the paper in which the agreement is expressed. An ordinary invoice is not a contract passing title. Like any other paper, however, it may be the medium used to express the contract between the parties, in whole or in part. In **9 Cyc. 260** the following general statement of this principle is given: "A contract may be formed by accepting a paper containing terms. If an offer is made by delivering to another a paper containing the terms of the proposed contract, and the paper is accepted, the acceptor is bound by its terms."

It is, therefore, respectfully submitted that the contractural relation between the parties to this case embraces the profit sharing plan upon the conditions therein expressed, and the covenant against re-sale; and that there is no sound foundation for the argument that this case can be distinguished from the Continental Wall Paper case upon the proposition that in the case at bar a contract between the parties is not shown.

For the sake of the argument, however, it may be assumed that all of these arrangements between the parties should not be regarded as contracts. It cannot, however, be argued that they were not the means adopted for perpetuating the illegal monopoly of the defendant in error. Their purpose in this respect is shown on their face, and their operation in this respect is shown by the allegation of the answer that they enabled the defendant in error to maintain a practically complete monopoly, and to enhance prices to an exorbitant extent.

Nor can it be argued that the sales were not made with reference to and in execution of this profit sharing arrangement. It was proposed as a definite arrangement covering all sales, and every sale made thereafter was necessarily made with reference to the plan, and in execution thereof.

Suppose the arrangement is called a plan or device or offer for illegally restraining and monopolizing interstate trade instead of a contract for restraining and monopolizing interstate trade, and it is conceded, as it must be conceded, that the sales were made in execution of and with reference to such plan on the part of the illegal combination. The question would arise does this on principle affect the situation?

In the Continental Wall Paper Co. Case the recovery was denied because the sales were made with reference to and in execution of the plan adopted to accomplish the illegal end of the combination. That plan happened to be a contract. Its illegality, however, consisted not in the fact that it was a contract but in its purpose and effect. Any plan or method of accomplishing the same end is illegal.

Nash vs. United States, 229 U. S. 373;

Swift & Co. vs. United States, 196 U. S. 375;

Loewe vs. Lawlor, 208 U. S. 274.

When the sales are made with reference to and in execution of the plan by which combination carries into effect its illegal purpose, it can make no difference whether the plan consists of contracts or other means.

Respectfully submitted,

MARION SMITH,

Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1913

No. ~~892~~ 71

D. R. WILDER MANUFACTURING COMPANY

Plaintiff in Error

versus

CORN PRODUCTS REFINING COMPANY

Defendant in Error

BRIEF AND ARGUMENT IN BEHALF OF CORN PRODUCTS REFINING COMPANY, DEFENDANT IN ERROR

JAMES W. AUSTIN,
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(23,450)

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D. R. WILDER MANUFACTURING COMPANY,
Plaintiff in Error.
versus
CORN PRODUCTS REFINING COMPANY,
Defendant in Error.

Appeal from Court of Appeals of Georgia.

BRIEF AND ARGUMENT IN BEHALF OF CORN PRODUCTS REFINING COMPANY, DEFENDANT IN ERROR.

STATEMENT OF CASE.

The Corn Products Refining Company, defendant in error, brought suit on open account against the D. R. Wilder Manufacturing Company, plaintiff in error, in the City Court of Atlanta, May Term, 1909, to recover the purchase price of two shipments of glucose sold and delivered during the year 1909.

The plaintiff in error filed its answer in which it admitted the purchases on open account at the prices alleged, the receipt of the glucose, and its failure to pay for it, but plead that the purchase price could not be collected because the defendant in error was an unlawful combination and conspiracy in restraint of interstate trade.

The plaintiff in error further alleged in support of its defense that the defendant in error had sent to it a letter dated March 9, 1907, in which letter the defendant in error announced the inauguration of a policy whereby it offered to give to its customers a rebate of "some certain amount per hundred pounds upon all purchases of glucose or grape sugar during any years, provided, and upon the condition that, the said purchaser, during the following year, gave to the said Corn Products Refining Co., its exclusive patronage."

The plaintiff in error further defended on the ground that upon each invoice for the glucose purchased, appeared the clause: "The goods herein sold are for your own consumption only, and not for re-sale," which is characterized as a "contract" in restraint of trade.

The plaintiff in error did not allege that it accepted the offer of defendant in error, or that it bound itself by agreement to purchase exclusively from defendant in error, or that it promised not to re-sell the goods purchased, or that any agreement existed between them other than the contract of sale, or that it was in any manner or way a party to, or connected with, the alleged illegal combination in restraint of trade.

On the other hand, the plaintiff in error admitted in its answer that it did not accept the offer of defendant in error to give a rebate, and that it did not in fact purchase exclusively from the defendant in error, by alleging in paragraph 10 of its answer that it was entitled to rebates on its purchases for the year 1908 "notwithstanding its failure to comply with said condition."

The defendant in error filed a motion to strike the answer as setting out no legal defense, which motion was sustained and a verdict and judgment rendered against the plaintiff in error.

On writ of error the Court of Appeals of Georgia af-

firmed the judgment of the City Court. (Wilder Manufacturing Co. vs. Corn Products Refining Co., 11 Ga. App. 588).

The question before this Court, therefore, is solely whether the allegations of the answer, as pleaded, are sufficient to constitute a legal defense to the suit under the Act of Congress of July 2, 1890, commonly referred to as the Sherman Anti-Trust Act.

BRIEF.

I.

The answer filed by the plaintiff in error does not allege sufficient facts to support the conclusion of the pleader that the defendant in error is an unlawful combination and conspiracy in restraint of interstate trade, and was formed for the purpose of monopolizing and restraining trade in violation of the Act of Congress of July 2, 1890, referred to as the Sherman Anti-Trust Act.

Standard Oil Co. v. United States, 221 U. S. 1;

United States v. American Tobacco Co., 221 U. S. 106;

Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227;

Connolly v. Union Sewer Pipe Co., 184 U. S. 679;

Wilder Mfg. Co. v. Corn Products Co., 11 Ga. App. 588.

IX.

The so-called "profit sharing plan," and similar methods of merchandising, do not violate the provisions of the Sherman Act.

Whitwell v. Continental Tobacco Co., 125 Fed. 454;

In re Corning, 51 Fed. 205;

In re Green, 52 Fed. 105.

X.

The defense urged by the plaintiff in error that upon each invoice for the glucose purchased was inserted the clause, "The goods herein sold are for your own consumption only and not for re-sale," alleged to be a "contract" in restraint of trade, is merely a conclusion of the pleader.

XI.

It is well established that an invoice is not a bill of sale, nor is it evidence of a sale, nor does it constitute a "contract of purchase."

Dows v. National Exchange Bank of Milwaukee, 91 U. S. 618;

Miller v. Van Tassel, 24 Cal. 458.

XII.

The failure of the plaintiff in error to allege that it agreed to the clause against re-sale is fatal to its plea.

Georgia Cane Products Co. v. Corn Products Refining Co., supra.

XIII.

Even though it were true that a promise not to re-sell had been made, this fact alone would not bring the case within the decision of this Court in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra.

CONCLUSION.

WHEREFORE, the decision of this Court in the case of Connolly v. Union Sewer Pipe Co., supra, is controlling, and the judgment of the Court of Appeals of Georgia should be affirmed.

ARGUMENT.

The answer filed by the plaintiff in error does not set out sufficient facts to show either contract, combination or conspiracy to restrain trade in violation of the Act of Congress of July 2, 1890, referred to as the Sherman Anti-Trust Act.

The Court of Appeals of Georgia deemed it unnecessary to decide whether the failure of the plaintiff in error to set forth in its answer sufficient facts to support the general allegation that the defendant in error is an illegal combination was, under the Georgia practice, reached by a motion to strike the answer, since the judgment in favor of the defendant in error was sustained upon another ground. Though the Court declared:

> "However, as stated, we make no express ruling on this question."

The Court did decide on the other hand that:

> "The answer was clearly subject to special demurrer. The allegation that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, and was formed for the purpose of monopolizing and restraining trade, is clearly a conclusion of the pleader, and no sufficient facts seem to be alleged to support this conclusion and bring the case within the recent decisions of the Supreme Court of the United States in Standard Oil Co. v. United States, 221 U. S. 1; and United States v. American Tobacco Co., 221 U. S. 106."

It is urged, nevertheless, that the failure of the plaintiff in error to allege facts making out its defense was fatal, and that the answer was subject to the motion to strike which, under the Georgia practice, is equivalent to a general demurrer.

This defect was not one which could only be reached by a special demurrer. A special demurrer is necessary only where the defect is one of form and not of substance. But where the defect is a failure on the part of the pleader to allege facts which make out his case on the one hand, or his defense on the other, it is subject to general demurrer.

In Martin v. Bartow Iron Works, supra, the leading Georgia case upon this question, the Supreme Court clearly stated the distinction.

(At page 322 of the opinion).

> "A general demurrer enables the party to assail every substantial imperfection in the pleadings of the opposite side without particularizing any of them in his demurrer, but if he thinks proper to point out the faults, this does not vitiate it.

> "A special demurrer goes to the structure merely, and not to the substance, and it must distinctly and particularly specify wherein the defect lies."

The above language was quoted with approval by the Court of Appeals of Georgia in Douglas, etc., R. Co. v. Swindle, supra.

In the case of James v. Kelley, et al., supra, the Supreme Court of Georgia sustained a general demurrer to a petition setting forth only general allegations of fraud, the Court declaring (page 452).

> "The charges of fraud and collusion other than the foregoing, and the intent on the part of the administrator to defraud petitioners in such sale, are made in general terms, with no other specific acts alleged than those which have been enumerated. The rule is that the pleadings must state facts and not legal conclusions; and fraud is never sufficiently pleaded except by a statement of the facts upon which the fraud is based. General charges will not be considered. Tolbert v. Caledonian Insurance Co., 101 Ga. 741. For these reasons, the petition presented did not set forth a cause of action, and the Court committed no error in sustaining the demurrer to the same."

The above ruling is sustained by the decisions of the Court of Appeals in Carroll v. Hutchinson, 2 Ga. App. 60, and in Moultrie v. Schofield, etc., Co. 6 Ga. App. 464. In the latter case the Court declared (page 469).

> "3. The plea alleging that the defendant was induced to sign the note and the contract because of fraudulent representations was properly stricken. The plea consisted for the most part of conclusions of the pleader, and did not set forth specific acts constituting fraud, or facts justifying the conclusion pleaded."

It is well settled that under the Georgia practice a motion to strike is the equivalent of a general demurrer.

In Walden v. Walden, supra, the Supreme Court of Georgia declared (page 146):

> "Good practice would require that the plaintiffs should take advantage of the fatal defect in the defendant's plea either by demurrer or by a motion to strike made before verdict."

In the case of Morgan v. Cobb, supra, the plaintiff sued the defendant upon certain promissory notes. The defendant in her answer admitted the execution and delivery of the notes to the plaintiff and that he was the owner of the same and had the right to sue thereon, but set up by way of special plea general allegations of fraud on the part of the plaintiff without setting forth sufficient facts to support the allegations. The plaintiff made a motion to strike the plea which motion the lower Court over-ruled. On appeal to the Supreme Court of Georgia the judgment was reversed and it was held that the plea should have been stricken.

This decision is controlling upon the point that where facts sufficient to support the conclusion relied upon are not alleged in the answer, that a motion to strike the plea should be sustained.

An examination of the answer filed by the plaintiff in error reveals that the allegations therein contained are mere conclusions of the pleader.

No facts are set out which show that the defendant in error is a combination or conspiracy in restraint of interstate trade.

No agreements are set out, or other facts stated which show that the purpose of the formation of the defendant in error corporation was to restrain interstate trade.

No agreements or other facts are alleged which show that the plaintiff in error was, or is, a member of, or a party to, the alleged illegal combination in restraint of interstate trade.

The answer contains general allegations of "agreements" to give rebates, and "contracts" in restraint of trade, but these allegations also, as shown later in this Brief, are mere conclusions of law, as no such agreements are set out in the answer, and no facts are alleged which in law constitute a contract.

For these reasons, it is respectfully submitted, that the answer filed by the plaintiff in error does not set out sufficient facts to show either contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, and does not come within the decisions of this Court in Standard Oil Co. v. United States, supra; United States v. American Tobacco Co., supra; and Continental Wall Paper Co. v. Louis Voight & Sons Co., supra.

It is clearly settled by the decision of this Court in Connolly v. Union Sewer Pipe Co., supra, that a violation of the Sherman Anti-Trust Act, by the formation of a combination in restraint of trade, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods.

As declared by Mr. Justice Harlan, who wrote the opinion in that case (page 686):

> "If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became sub-

ject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The meaning of this decision can be no better expressed than in the exact language of Mr. Justice Harlan above quoted, that **where there is no necessary legal connection between the sale and the alleged arrangement in restraint of trade,** a suit for the purchase price of the goods sold will be upheld because such **is not an action to enforce the terms of the unlawful arrangement.**

Attention is called to the language used by Mr. Justice Harlan, that there must be a ***"legal connection"*** between the sale and the unlawful arrangement in order that the Sherman Act shall apply to the contract of sale.

This language, it is submitted, makes clear the mean-

ing of the subsequent decision of this Court in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, also written by Mr. Justice Harlan, and upon which the plaintiff in error rests its case.

In the case of Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, the facts were that previous to the sales in question the plaintiff and defendant had entered into a written bilateral contract whereby the plaintiff agreed to sell to the defendant and the latter agreed to buy exclusively from the plaintiff, the same being an arrangement for the restraint of interstate trade, and the purchases there in question were made by the defendant in the performance of its part of the unlawful agreement. The contract of sale was a part of and inseparable from the unlawful contract; the buyer and seller were both parties to the unlawful combination by virtue of a binding agreement previously made, and to have given effect to the sale would have necessitated upholding the unlawful bilateral contract which compelled the purchase. Therein exists the *"legal connection"* which Justice Harlan had in mind when he wrote the opinion in the case of Connolly v. Union Sewer Pipe Co., supra.

Indeed, Mr. Justice Harlan in distinguishing the two cases employed the same reasoning. Beginning on page 261 of the opinion in the case of Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, the following appears:

> "The case now before us is an entirely different one. The Continental Wall Paper Co. seeks, in legal effect, the aid of the Court to enforce a contract for the sale and purchase of goods which, it is *admitted by the demurrer was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* We state the matter in this way, because the plaintiff by its demurrer admits for the purposes of this case the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that

the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.

"The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Co. was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the Court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the *Connolly Case.*"

(The italics are by the Court).

The distinction is clear and plain. In the Connolly Case there existed no contractual relations between the buyer and seller other than that of vendor and purchaser. The former was not bound to sell and the latter was not bound to purchase. And, as stated by this Court in the case of Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, with reference to the Connolly Case (page 261):

"In that case the Court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground *merely* that the seller, who owned the goods was an illegal combination or trust. We held that he could not,

and nothing more touching that question was decided or intended to be decided in the *Connolly Case.*"

In the Continental Wall Paper Co. Case, however, both plaintiff and defendant were parties to a written, binding contract in restraint of trade. The seller was bound to sell and the buyer was bound to purchase. The purchase was not voluntary. It was not by virtue of a collateral, independent contract, but was made in performance of, and pursuant to, an existing bilateral contract which was unlawful, and which was a part of, and inseparable from, the contract of sale.

Borrowing the language of the Court (page 262):

> "The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into Court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, so far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule; long established in the jurisprudence of both this country and England, that a Court will not lend its aid, in anyway, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay."

In the case of International Harvester Co. of America v. Oliver, supra, Cochran, J. speaking for the Circuit Court, E. D. Kentucky, declared (page 66):

> "The sole difference between the facts of the two cases, as I make it out, is that in the Connolly Case the purchaser was not, and in the Voight & Sons Case he was, a member of the combination, not, however, willingly so, or to the same extent as others were—i. e., as a seller—but in that before he purchased he had agreed with the seller members of the combination to purchase from no one else than the combination and to re-sell at prices fixed by the combination. There is reason to suspect that in reality the cases were substantially the same, i. e., that in the Connolly Case, also, the purchaser was in like manner a member of the combination, and that in considering and disposing of the case this feature of it was overlooked or ignored. The basis of this suggestion is to be found in the closing part of Mr. Justice Holmes' dissenting opinion. And at best the difference between the two cases is a very narrow one. Yet, notwithstanding this, the distinction which Mr. Justice Harlan, who wrote the opinion in both cases, drew between the two cases, which was thought to call for a difference in decision, is a plain one, and there ought to be no difficulty in determining on which side of the dividing line this case belongs. It is clear that it comes within the Connolly case, and not within the Voight & Sons Case. It is not possible to say that the defendant here was a member of or a party to the illegal combination set forth in the second paragraph of the defendant's answer. And if the true relation between the plaintiff and defendant was that of principal and agent, and the contracts sued on were mere pretenses, the case is not otherwise.
>
> "If the purchaser of property from an illegal combination is bound to pay the purchase price, so

is one who receives property from it upon a contract to sell same for it at certain prices by a certain date, or account to it for those prices at that time, if not then sold."

In the case of United States Fire Escape Counterbalance Co. v. Joseph Halsted Co., supra, Sanborn, J. of the District Court, Northern District of Illinois, declared as follows (page 298):

> "The question of the validity of contracts of sale by an unlawful trust, made in furtherance of the combination, was examined at length in Continental Wall Paper Co. v. Voight, 212 U. S. 227, 256, 29 Sup. Ct. 280, 53 L. Ed. 486, and such a sale was held void in a suit brought on the contract. The Connolly Case was distinguished on the ground that the sale there was not a part of, nor in execution of, any general plan or scheme condemned by the law. It was simply the case of a corporation selling its own goods to a stranger wishing to buy them. But in the Voight Case the sale was based upon agreements which were essential parts of an illegal scheme, the vendee having made a purchasing agreement by which sales were unlawfully restricted. Judgment for the corporation would have given effect to an illegal combination."

Continuing on page 299 the Court further stated:

> "By the amendment now under consideration, it is sought to bring the patent transfer within the Voight Case through the allegation that it was an essential part of the combination. If, in making a decree for infringement or in dismissing for want of it, it were necessary to give effect to an illegal trust, the Voight Case would apply. But a decree adjudging infringement would not do this. It would establish title in complainant and infringement by defendant, and this without touch-

ing the question of illegal combination. That question the Court is not compelled to decide. If a suit were brought directly upon the patent transfer, and the defense that it was an essential part of the unlawful trust were raised, then the court would be obliged to consider that question. The transfer in that event could not be upheld without sustaining also the trust, if one really existed. Not so here. No one is before the Court who has any title or standing to raise the question of trust or no trust; because the patent transfer is valid whether or not any unlawful combination in reality exists."

For similar conclusions, see:

Boatman's Bank of St. Louis v. Fritzlen, et al., 175 Fed. 183;

Steele v. United Fruit Co., 190 Fed. 631.

It is evident, therefore, that to bring the present case within the decision of this Court in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, it must appear from the facts set forth in the answer filed by the plaintiff in error that it was a party to the unlawful combination, and that the purchase was made in the performance by it of its part of an unlawful contract previously made with the defendant in error, so that to uphold the sale would necessitate giving effect to the unlawful contract.

On the other hand if it does not appear from the facts set forth in the answer that the plaintiff in error was a party to the unlawful combination, but that the purchase in question was made voluntarily, under a collateral, independent contract, and not pursuant to an existing agreement which was unlawful and of which the sale was an inseparable part, then the decision of this Court in Connolly v. Union Sewer Pipe Co., supra, is controlling.

The argument by counsel for the plaintiff in error that the case of Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, is controlling, is predicated upon the premise that "the sales under consideration were made within the knowledge of both buyer and seller with direct reference to and in execution of an illegal agreement." This argument would perhaps be deserving of much consideration if the assumption therein contained were true. But it is respectfully submitted that under the facts as pleaded in the answer of the plaintiff in error, the sales in question were not, and could not have been made with reference to or in the performance of any agreement, either lawful or unlawful, as there existed between the parties no contract of any nature whatsoever. That which counsel for the plaintiff in error persistently refers to as an "illegal agreement" was the offer made by the defendant in error to its customers to give a rebate at the end of a specified time to those who purchased exclusively from it during said period, which it is submitted was nothing more than an offer contemplating a unilateral contract, revokable at any time before acceptance, and until accepted by the offeree by a compliance with its terms cannot be said to constitute an "agreement" or "contract."

Counsel for the plaintiff in error, in both the pleadings and the Brief, has very adroitly characterized this offer always as an "agreement" or "contract," but an examination of "Exhibit A" attached to the answer of the plaintiff in error (page 14 of the Record) and which it is alleged in paragraph 4 of said answer is "a copy of the contract relative to the rebate on its 1906 business, under which it was agreed to give the defendant a rebate of 10 cents per hundred pounds on all shipments of glucose purchased by it from the plaintiff during 1906 provided it gave to the plaintiff its exclusive trade during the year 1907," reveals no contract at all, but only an offer, which does not appear either from the facts alleged in the answer or from "Exhibit A" was ever accepted by the plaintiff in error. It is further alleged in said answer that "A substantially similar contract was en-

sors' (the property of which corporations the defendant afterward bought and to the business of which it succeeded) 'the intention to adopt a liberal plan of profit sharing with defendant and such of its other patrons as should in the future purchase exclusively glucose and grape sugar from plaintiff.' The announcement of an intention to 'adopt a liberal plan of profit sharing' does not create a contract for any definite plan, or for any certain amount or proportion of profits, or one to continue for any certain time."

After discussing in detail the offer made by Corn Products Refining Co., the Court concluded as follows (page 43):

> "The difficulty with the defendant's allegations on this subject is that they show not the slightest agreement or assurance by the plaintiff to the effect stated, nor anything authorizing the defendant to claim any definite contract of the kind which it seeks to enforce. There is an old adage that 'it takes two to make a bargain.' The defendant alone could not make one. Apparently with it 'the wish is father to the thought,' but a Court cannot give damages based on mere anticipations and expectations. One's business or personal associations may prove disappointing and unprofitable, but such unfulfilled hopes, in the absence of definite contract, do not give the right to cure the disappointment with the salve of damages. There was no error in striking the paragraphs of the defendant's answer which sought to recover from the plaintiff on account of a breach of contract."

To bring the case under consideration within the decision in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, it must appear that the purchase was made "in execution of" an illegal contract. For the purchase to have been in execution of a contract it must appear that there was a contract existing at the time of the

purchase. In order for there to have been a contract existing at the time of the purchase it must appear that the parties were bound by agreement of some sort. "To characterize a thing a contract, which, under the facts alleged, is no contract, is not enough." It follows, therefore, that since at the time of the purchases in question neither the vendor nor the vendee was bound unto the other that there existed between them no contract with which the purchases could have any "legal connection."

The so-called "profit sharing plan" possesses no novel features, being in its essentials one of the oldest established merchandising methods both in this country and elsewhere.

To paraphrase, the seller simply says to the buyer: "If you purchase all of your requirements from me this year, I will return to you a part of last year's purchase money." There is no obligation on the part of the buyer to do this; he can at any time purchase elsewhere, as much or as little as he sees fit.

This method of merchandising is open to all; however, it is a matter of common knowledge that it has of recent years almost entirely fallen into disuse because of its peculiar vulnerability at the hands of competitors, who either "discount" the future prize held out by offering an immediate and present prize in the shape of lower current prices, or else the competitors themselves inaugurate a rival profit sharing plan, arranged with reference to the known terms of the original inaugurator's plan and the known market conditions under which it is operating, so as to more than offset the latter's advantages.

It has frequently been held by the Federal Courts that this and similar methods do not violate the provisions of the Sherman Act.

Whitwell v. Continental Tobacco Co., supra;

In re Corning, supra;

In re Greene, supra.

In the case of Whitwell v. Continental Tobacco Co., supra, Sanborn, J. referring to a plan similar to that under consideration, declared (page 458):

> "If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation."

If the particular merchandising method under consideration is not itself illegal, then, it is submitted that it does not become so merely because employed by a large company, even if we assume the latter has a monopoly—in which case the size and organization of the company, and not its merchandising methods, constitute the gravamen of any violation of the Sherman Act, which, as decided in Connolly v. Union Sewer Pipe Co., supra, cannot be attacked collaterally.

The further defense urged by the plaintiff in error that upon each invoice for the glucose purchased was inserted the clause, "The goods herein sold are for your own consumption only and not for re-sale," which is characterized as "the contract of purchase," is affected with the same fatal infirmity as the allegations concerning the so-called "profit sharing contract," in that the allegation is a mere conclusion of the pleader.

This defense is predicated upon the assumption that a phrase inserted in the invoice alone constitutes a contract.

On page 5 of the Brief submitted by the plaintiff in error, its pleadings upon this point are construed as follows:

"To further effectuate its illegal monopoly the defendant in error inserted in each invoice, including the invoices for the goods on which suit is brought, the agreement that the goods were sold for the consumption of the purchaser only, and not for re-sale. This provision it is alleged appears in all invoices both to the plaintiff in error and to all other consumers of glucose."

Again on page 17 of the Brief submitted by the plaintiff in error, it is stated by way of argument:

"The Court will also bear in mind that the provision in each invoice that the goods covered by it were only for consumption by the purchaser and not for re-sale, was also a part of the contractural relation between the parties.

And on page 19 of the Brief:

"The covenant against re-sale was repeated in each invoice."

This, we submit, is wholly a conclusion of law, because it does not follow from the mere fact that such phrase appeared upon the invoice for the goods purchased that a "contract" thereby existed between the parties binding the plaintiff in error not to re-sell the goods purchased.

As stated by the Supreme Court of Georgia in its decision in Georgia Cane Products Co. v. Corn Products Refining Co., supra:

"To characterize a thing as a contract, which, under the facts alleged, is no contract, is not enough; and a plea based on such allegations is demurrable. • • • • • • • • • • • • • There is an old adage that 'it takes two to make a bargain.' The defendant "alone could not make one."

Attention is called to the fact that in the above case, as in the case under consideration, a general motion to strike the answer was held to be sufficient.

It is well established that an invoice is not a bill of sale, nor is it evidence of a sale, nor does it constitute a "contract of purchase."

In Miller v. Van Tassel, supra, the Court, through Rhodes, J. declared (page 466):

> "An instrument simply expressing that the vendor has sold to the vendee a certain chattel at a specified price, the receipt of which is acknowledged, and which is usually denominated a bill of sale, does not amount, in legal contemplation, to a contract, defined by Parsons (Vol. 1, page 6), as 'an agreement between two or more parties for the doing or not doing of some specified thing,' but amounts rather to a bill of parcels according to commercial usage."

In the case of Dows v. National Exchange Bank of Milwaukee, supra, this Court declared through Mr. Justice Strong (page 630):

> "An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. It seems unnecessary to refer to authorities to sustain this position. Reference may, however, be made to Shepherd v. Harrison, L. R. 5 Eng. & Ir. Ap. Cas. 116, and Newcomb v. R. R. Co., 115 Mass. 230. In these and in many other cases it has been regarded as of no importance that an invoice was sent by the shipper to the drawee of

the drafts drawn against the shipment, even when the goods were described as bought and shipped on account of and at the risk of the drawee."

It is not alleged in the answer that the defendant in error would not sell to the plaintiff in error unless it promised not to re-sell the goods purchased, nor is it alleged that the plaintiff in error did in fact make any such promise.

Even though it were true that such a promise had been made, it does not appear from the answer how this could in practical effect operate to restrain trade. As stated by the Court of Appeals (page 602).

> "If not valid, it is incapable of enforcement, and does not restrain the purchaser from re-selling the goods at his pleasure."

It is clear from the record that the glucose in question was purchased by the plaintiff in error for its own consumption, and not for the purpose of re-sale, and it does not appear in what manner the public is affected by this alleged clause appearing upon the invoice.

It certainly cannot be said that this phrase alone would bring this case within the decision in Continental Wall Paper Co. v. Louis Voight & Sons Co., supra, because in that case to have sustained the sale would have necessarily given effect to a previous written agreement between the vendor and vendee, which was unlawful, and which compelled the purchase, whereas, in the case under consideration it by no means follows that to compel the plaintiff in error to pay for the goods which it has received and consumed would necessitate giving effect to a collateral phrase against re-sale.

Employing the reasoning of Sanborn, J. in the case of United States Fire Escape Counterbalance Co. v. Joseph Halsted Co., supra, it may be said that if, in en-

tering a judgment against the plaintiff in error upon a suit on open account for the purchase price of goods bought, it were necessary to give effect to an illegal trust, the Voight Case would apply. But a judgment compelling the plaintiff in error to pay for what it has received and consumed would not do this. That question the Court is not compelled to decide. If a suit were brought to enforce a promise not to re-sell goods purchased, and the defense that it was void as being in restraint of trade were raised, then the court would be obliged to consider that question. But the suit in question does not seek to enforce any such promise, nor can it be said that a judgment for the purchase price would indirectly give effect to such an agreement, as the purchase by the plaintiff in error was made voluntarily and without reference to any agreement of any kind existing between the parties.

At most, it can only be said that a clause against resale is merely collateral to the sale itself, which, if illegal, falls for its illegality the moment it is made and does not force, or coerce, the vendee to do, or refrain from doing, any act in the future. It in no manner or way prompted, or compelled, the purchase, nor does it in practical effect operate to restrain trade. It cannot be said that a purchase made under these circumstances was made "in execution" of, or "pursuant to," an unlawful agreement in restraint of trade, to which the buyer, as well as the seller, was a *particeps criminis*.

It is therefore respectfully submitted that this case is controlled by the decision of this Court in Connolly v. Union Sewer Pipe Co., supra, and that the judgment of the Court of Appeals of Georgia be affirmed.

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Supreme Court of the United States

OCTOBER TERM, [illegible]

No. [illegible] 71

D. R. WILDER MANUFACTURING CO.

Plaintiff in Error

versus

CORN PRODUCTS REFINING COMPANY

Defendant in Error

SUPPLEMENTAL BRIEF IN BEHALF OF CORN PRODUCTS REFINING COMPANY, DEFENDANT IN ERROR

[illegible]

Attorney for Defendant in Error

[illegible]

Of Counsel.

([illegible])

IN THE

Supreme Court of the United States

No. 392 October Term, 1913

D. R. WILDER MANUFACTURING COMPANY, Plaintiff in Error. versus CORN PRODUCTS REFINING COMPANY, Defendant in Error.	Appeal from Court of Appeals of Georgia

SUPPLEMENTAL BRIEF AND ARGUMENT IN BEHALF OF CORN PRODUCTS REFINING COMPANY, DEFENDANT IN ERROR.

Since filing the original brief in behalf of Corn Products Refining Company, the defendant in error, a reply brief has been filed by D. R. Wilder Manufacturing Company, the plaintiff in error. Certain statements and arguments contained in the reply made by the plaintiff in error have made it seem advisable for the defendant in error to file this supplemental brief.

At the outset, the reply brief filed by the plaintiff in error summarizes the contentions of the defendant in error as follows (pages 1 and 2):

> "In the brief of the counsel for the defendant in error, two propositions are asserted: 1. That

the answer does not set out sufficient facts showing the defendant in error to be a combination violative of the Sherman Act on account of its restraint of interstate trade. 2. That no contract of any kind existed between the parties either as to (a) the profit sharing plan, or (b) the covenant against re-sale."

The foregoing, while it states a part of the contentions of the defendant in error, fails to state all of them. The others are:

(3) That if the answer of the plaintiff in error be considered by this Court to allege sufficient facts to show the formation of a combination in restraint of trade, this does not alone preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods. Connolly v. Union Sewer Pipe Co., 184 U. S. 679.

(4) That the failure of the plaintiff in error to allege that it was a party to the unlawful combination, and that the purchases in question were made in the performance by it of its part of an unlawful contract previously made with the defendant in error, is fatal to the contention that this case is controlled by the decision in Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227.

(5) That the so-called "profit-sharing plan" is not inherently offensive to the Sherman Law.

(6) That if it is not inherently offensive to the Sherman Law, it does not become so merely because employed by an organization which, for the purpose of this argument on demurrer, may be considered a combination in violation of that law.

(7) That this suit does not seek to enforce the alleged clause against re-sale, which, at most, can only be

said to be collateral to the sale, and which clause would not be rendered binding by a judgment for the purchase price of the goods.

In addition to the foregoing, the defendant in error desires to present in this supplemental brief the further contention in support of point one that the pleadings do not show that the sales in question constituted, or were connected with commerce among the several states, or with foreign nations, and therefore no federal question is presented to this Court.

The defendant in error also desires to urge in support of points five and six the further contention that the legality or illegality of the so-called "profit-sharing plan" is not in issue in this case, which seeks only to enforce two entirely separate and distinct promises to pay the purchase price of goods sold and delivered.

The pleadings fail to show that the transactions involved were a part of interstate commerce.

In support of this contention, defendant in error points out that it does not appear, from an inspection of the pleadings, (1) that the contracts of purchase and sale, which are the basis of the suit, were transactions between citizens, or inhabitants, of different states; (2) nor that the alleged illegal agreement relating to the "profit-sharing plan," or the alleged illegal agreement affecting re-sale, were contracts, or agreements, between citizens, or inhabitants, of different states; (3) nor that the subject matter of these agreements, or of either of them, related to interstate commerce; (4) nor that the answer, or the petition, taken in connection with the answer, alleges or shows that the goods in question were transported, or shipped, from one state into another.

The allegations of the answer are wholly silent as to any of these essential averments of fact. Neither does the declaration or complaint, if considered by the Court

in aid of the answer, supply the allegations missing from the answer, unless the exhibits alone, attached to the complaint, may be taken to show, inferentially, that the goods in question were interstate shipments.

If the exhibits to the complaint are looked to, (and it is insisted that these exhibits are the only parts of the entire record which give even the hint of a suggestion going to show an interstate transaction), the following indicia of an interstate shipment are found, viz: upon the invoices attached as Exhibits "A" and "B" to the complaint, appears this dating: "26 Broadway, New York, January 26th, 1909," on "A," and "26 Broadway, New York, January 27th, 1909," on "B," and in each invoice, underneath the dating: "Sold to D. R. Wilder Manufacturing Co., Atlanta, Ga.," and, upon the next line below, the following: "C. & W. I. C. C. of Ga. at Chattanooga."

If these indicia appearing on the invoices, alone, are, in themselves, sufficient to reasonably justify the presumption that the goods sold were shipped from one state into another, it is insisted, nevertheless, that this presumption arising solely from exhibits attached to the complaint, must be excluded by the operation of the rule that **exhibits to a pleading cannot be considered for the purpose of supplying substantial allegations essential to the statement of the cause of action, or defense.**

Hibernia Savings Society v. Thornton, 117 Cal. 481.

It is, therefore, insisted that in so far as the record discloses, the transactions set out in the answer may have been dealings between inhabitants or citizens of the same state, solely; that the goods in question may have been an intra-state shipment, only; and that the acts complained of in the answer, even if taken to be true, could not be held to be in restraint of interstate trade or commerce.

Wherefore, defendant in error contends that no Federal question is presented by this record.

The construction placed by counsel for plaintiff in error upon the offer of Corn Products Refining Co. is erroneous.

Counsel for the plaintiff in error has endeavored to construe the offer made by the defendant in error, which is set forth in Exhibit "A" attached to the answer filed in this case, to mean that in consideration of a single purchase made by the plaintiff in error from the defendant in error, that the latter promises to give a rebate on purchases made during the previous year, provided the plaintiff in error purchases exclusively from the defendant in error during the following year.

On page 11 of the reply brief filed by the plaintiff in error, the following appears:

> "The principles established by the authorities herein cited when applied to the facts of this case require the conclusion that when under the offer made to the plaintiff in error it commenced giving its .909 trade to the defendant in error, it accepted the proposition and furnished a consideration for the contract. The contract was, of course, conditioned on its continuing to give its exclusive trade, and if it failed to do so the promise of the defendant in error never matured, but the contractual relation came into existence when the trading commenced, and from then on the defendant in error could not withdraw from its promise, except upon a breach of the condition which entered into the existing contract of the parties."

However, an examination of Exhibit "A" reveals no such offer. The offer consists of the following letter sent by the defendant in error to the plaintiff in error:

"CORN PRODUCTS REFINING COMPANY,
26 Broadway, New York, March 9, 1907.
"D. R. Wilder Mfg. Co.,
Atlanta, Ga.

"Gentlemen: This Company recognizing the fact that its own prosperity, in a great measure,

is interwoven with the good will and co-operation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage.

"This company inaugurates such a policy of profit-sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to ten cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906.

"This amount will be paid to you or your successors on December 31st, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

"With the assurance of steadfast co-operation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

Yours very truly,
CORN PRODUCTS REFINING CO.,
E. B. Waeden."

It is alleged that a substantially similar offer was made with reference to trades in 1907, 1908 and 1909, with the exception that with reference to the latter two years the rebate was advanced from 10 cents to 15 cents per hundred pounds.

Attention is first directed to the date of this offer, which appears to be March 9, 1907. An examination of the terms of the offer shows that the rebate offered was

not on purchases to be made subsequent to the date of the offer, but on purchases which had been made during the period of six months prior to the date of the offer. The offer then provides that the amount of the rebate will be paid to the customer on December 31, 1907, if at that time it shall appear that during the entire period beginning July 1, 1906, and ending December 31, 1907, the customer shall have purchased exclusively from the Corn Products Refining Company.

Attention is also called to the fact that this alleged offer was made in the form of a circular letter, and that as it required that the customer should not only purchase exclusively during the remainder of 1907, but that it should have also purchased exclusively during the period beginning July 1, 1906, and extending to the time of the offer, it was impossible for any customer to whom this offer was made to accept the same, unless, as a matter of fact, it had traded exclusively with the defendant in error from July 1, 1906, until March 9, 1907, being the date on which the offer was made.

It is not alleged in the answer that the plaintiff in error had in fact traded exclusively with the defendant in error, and it does not appear from the pleadings that the plaintiff in error was capable of accepting the offer even had it so desired.

Attention is also directed to the fact that the purchases upon which a rebate was offered were purchases which had been made by the customer several months before the offer was made. Accordingly, the offer made in 1909 was an offer of rebate on purchases which had been made in 1908, and in order for the customer to have accepted this offer, it must appear at the end of 1909, that during the period beginning in 1908 and ending in 1909, that the purchaser had traded exclusively with the defendant in error. It is admitted in the answer filed by the plaintiff in error that it did not trade exclusively with defendant in error during the period extending over

1908 and 1909, and therefore it is admitted that the offer made with reference to these years was not accepted.

Attention is further called to the fact that under this series of offers, a rebate upon purchases made in 1909, would not be offered until the year 1910, a year after the filing of this suit. So that it does not appear from the record that any offer of rebate was ever made by the defendant in error to the plaintiff in error with reference to the purchases in question.

It cannot, therefore, be said that the purchases upon which a rebate was offered were made by the plaintiff in error in consideration of a promise. Indeed, the purchases upon which a rebate was offered had been made before the offer came into existence. What then was the true meaning and significance of this offer? In effect, it was nothing more than an announcement by the defendant in error of an intention to return to its customers a certain part of the purchase money received on account of past purchases if at the end of a specified period of time, part of which time was before the making of the offer, and part of which was subsequent to the offer, it appeared that during the entire time the customer had traded exclusively with the defendant in error. There was no promise on the part of the customer to purchase exclusively, or at all. Nor was there a promise made by the defendant in error that it would sell to the customer in case it desired to purchase. At most, it was an offer calling not for one additional purchase to be made by the offeree after the date of the offer, but one which required the customer to purchase all of its requirements during the time specified from the defendant in error.

For illustration, it is submitted that under the terms of the offer set out in Exhibit "A" to the answer that if the customer had made one or two purchases after the date of the offer, but on December 31, 1907, it appeared that from July 1, 1906, to December 31, 1907, the cus-

tomer had not purchased all of its requirements from the Corn Products Refining Company, there would have been no acceptance of the offer, and therefore no contract.

Thus, the act called for by the offer was not the act of making one, or two, additional purchases, but rather the act of making all purchases during the specified time, however many there might be, from the defendant in error. It is obvious, therefore, that it was impossible to ascertain whether the terms of this offer had been accepted until the end of the time specified, and it appeared that the customer had during the entire time given to the defendant in error its exclusive patronage, and therefore no contract could have existed until the end of said period.

Counsel for plaintiff in error cites familiar illustrations of contracts wherein the consideration has been fully executed by the promisee and the liability of the promisor upon his promise remains contingent upon the happening of certain conditions, as where a sale of land has been made with a provision in the contract that the seller shall have the right to re-buy within a certain time at a specified price, or where in consideration of services rendered or money expended by a real estate broker the owner of land promises the broker the exclusive right to sell the land within a specified time. But these illustrations are not in point, and the principles there involved have no application to the case at hand.

It is submitted that counsel for the plaintiff in error has confused **consideration**, which is necessary to render a promise binding, and **acceptance of an offer**, which is necessary to constitute a contract. It is true that under many circumstances the same act or acts of the promisee may constitute both an acceptance of the offer, and the consideration for the promise made by the offerer, but under no circumstances can there exist a contract where

either of these elements is lacking. Thus where an offer calls for the performance of a series of acts by the offeree, the performance of some of the acts without a performance of all of the acts does not constitute an acceptance of the offer, and there is no contract. So, in the present case the admitted failure of the plaintiff in error to make all of its purchases during the time specified in the offer from the defendant in error constituted a rejection of the offer, and there was no contract.

Being a mere offer, it was revocable at any time before acceptance, and there could be no acceptance except in the exact terms of the offer and until all of the terms of the offer had been complied with.

It matters not that the plaintiff in error made some purchases after the date of the offer. If in fact it failed to purchase exclusively from the defendant in error during the time specified in the offer, the offer was never accepted, and there never existed between the parties a contract.

In support of this contention, the following cases are cited as authority:

Teipel v. Meyer, 106 Wis. 41;

Hoffman v. Maffioli, 104 Wis. 630;

Higbie v. Rust, 211 Ill. 333-337;

Darr v. Mummert, 57 Neb. 378.

The so-called "profit-sharing plan" is not offensive to the Sherman Law.

Whether the issue of the announcement by the defendant in error that it would divide a part of its previous year's profits with those of its customers purchas-

ing from it exclusively during a specified time (Record, page 14) constituted a mere continuing offer contemplating a unilateral contract, as contended in our original brief, or whether it was an offer which was accepted and became a contract as soon as the first order of a buyer was accepted, is immaterial as far as the question of the inherent legality of the "profit-sharing plan" itself is concerned. In either case there was no obligation on the part of the buyer to purchase exclusively, or, for that matter, at all, from the seller. The buyer was entirely free to purchase at will from others upon such terms and conditions as he chose; indeed, in the present case, the pleadings show the buyer admittedly did just this thing.

In its ultimate analysis the so-called "profit-sharing plan" consisted of nothing more or less than offering an inducement for custom. The inducement instead of, as in this case, being in the form of a rebate on past purchases, might have taken the form of more efficient service, longer credit, or, in fact, any one of an infinite variety of inducements to encourage increased or exclusive purchasing by the buyer. To condemn such a transaction is to condemn trade itself which has for its very foundation the offering of inducements for custom.

There is a very clear distinction between contractual obligations enforcing exclusive patronage, and mere inducements offered for voluntary exclusive patronage. The former might, perhaps, be said to restrain trade in certain cases, because purchasers are thereby removed from competition and prevented from stimulating it by their ability to accept competitive offers of better service, terms, or goods. Mere inducements offered to obtain customers' voluntary exclusive patronage, however, are not open to this objection, since purchasers are not thereby removed from competition, but, on the contrary, are left free to purchase where and when they choose, thus stimulating competition by their ability to accept more favorable inducements offered in competition with those based on exclusive patronage.

There is, moreover, no legal distinction between an inducement offered for voluntary exclusive patronage, and other trade inducements. Every seller necessarily monopolizes a customer's trade or restrains others from trading with him to the extent that he succeeds in obtaining such customer's business, whether he obtain 10%, 50% or 100% of such business. It is the **means** by which the business is obtained and not the result by which the legality of the transaction is determined. If by superior service, quality, or terms of sale, the seller succeeds in obtaining a part, or all of a customer's trade, he violates no law. What distinction, then, is to be drawn between voluntary exclusive patronage, obtained by giving a prize in the form of superior service, or quality, and exclusive voluntary patronage obtained, as in the present case, by offering a money prize? Obviously none. Any other conclusion leads to absurd illogicalities.

It may be argued, however, that while there is no offense involved in a small producer obtaining exclusive voluntary patronage by offering inducements of one form or another, nevertheless, for a large purchaser or a monopoly to do so is illegal. This brings up another point under consideration, namely:

If the so-called "profit-sharing plan" is not inherently offensive to the Sherman Law, it does not become so merely because employed by an organization, which, for the purpose of this argument on demurrer, may be considered a combination or monopoly in violation of that law.

A system of merchandising not inherently offensive to the Sherman Law does not become so by reason of the size or control over interstate commerce of the organization employing it. If it is not illegal for a small competitor to use a given system of selling goods, that system does not become illegal merely because used by a large competitor, or even a monopoly, or combination violative of the Sherman Law. The legality of the mer-

chandising system is one question; the legality of the organization of the user is an entirely separate and distinct question. One merchandising method when used by even the smallest competitor, because of its inherent illegality, may offend against the Sherman Law. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U. S. 502. Another merchandising method, because of its inherent inoffensiveness when used even by a monopoly may not offend. Connolly v. Union Sewer Pipe Co., 184 U. S. 679. In such cases the legality of any given merchandising method is a collateral question, unrelated to and distinct from the question of the legality under the Sherman Law of the organization using it; the first question depending upon the inherent qualities of the system itself; the second question upon the power, actual or potential, of the organization using it, to monopolize or restrain interstate commerce.

If in the present case on demurrer we assume as true the allegations in the answer that the defendant in error is a monopoly composed of all the previously competing companies in the United States, and that its organization offends against the Sherman Law, nevertheless the plaintiff in error cannot avoid paying for goods purchased from it and admittedly received, by alleging its use of an inherently inoffensive merchandising method, namely, the offer of a part of its previous year's profits in return for exclusive voluntary patronage, a merchandising method, moreover, which, at the time it was employed by the defendant in error, had received the approval of no less than three United States Courts, including one Circuit Court of Appeals.

In re Corning, 51 Fed. 205;

In re Green, 52 Fed. 105;

Whitwell vs. Continental Tobacco Company, 125 Fed. 454.

The legality or illegality of the so-called "profit-sharing plan" is not in issue in this case, which seeks to enforce two entirely separate and distinct agreements for the simple purchase and sale of goods.

The pleadings show that the action seeks to enforce two separate and distinct contracts entered into between the plaintiff and defendant in error for the simple purchase and sale of certain described goods at an agreed price. The invoices covering these sales are shown in defendant in error's "Exhibit A" and "Exhibit B." (Record, page 10.) Whether the "profit-sharing plan" be considered a contractual relation or merely a rejected offer (the pleadings showing that the plaintiff in error admittedly did not comply with its terms), the fact remains that in this action it is not sought to enforce any rights or obligations created by the so-called "profit-sharing plan." Irrespective of the legality of this plan, it is submitted that the contracts, the enforcement of which is being sought in this action, are simple contracts of purchase and sale, falling entirely within the scope of the Connolly Pipe case; the rights and liabilities created by them were entirely separate and distinct from those created under the "profit-sharing plan"—the rescission of the latter contract, if it be held a contractual relation, in no wise affected the rights of the parties under the separate and distinct purchase and sale agreements. In other words, it is submitted, there was no such interdependence or co-relation between these contracts as to make the legality of the purchase and sale contracts dependent upon the legality of the profit-sharing contract, or vice versa. Did the present case seek to enforce some right or obligation created by the "profit-sharing plan," and were this plan offensive to the Sherman Law, then, and then only, would the present case be brought within the scope of the Voight Wallpaper case.

The legality of the clause against re-sale is not in issue in this suit.

Likewise, it is submitted that this suit does not seek to enforce the alleged clause against re-sale, which, at most, can only be said to be collateral to the sale, and which clause would not be rendered binding by a judgment for the purchase price of the goods. It does not appear from the pleadings that this clause entered into the consideration for the sale, and, as declared by this Court, through Mr. Justice Holmes, in the case of Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, at page 185:

> "It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we would be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the consideration of his debt, and, in that round about way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. Oregon Steam Nav. Co. v. Winsor, 20 Wall, 64, 22 L. ed. 315 Bank of Australasia v. Breilat, 6 Moore, P. C. C. 152, 201; Pigot's Case, 11 Coke, 26b, 27b."

All of which is respectfully submitted:

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D. R. WILDER MANUFACTURING COMPANY *v.* CORN PRODUCTS REFINING COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 71. Argued November 9, 1914.—Decided February 23, 1915.

Where the pleading of the plaintiff in error demurred to justified the inference that the transaction alleged to be in violation of the Anti-Trust Act was interstate, the court may assume that such was the case, and, if the decision turns on the construction of the act, a Federal question is involved.

The general rule is that one who has dealt with a corporation as an existing concern having capacity to sell, cannot assert, or escape liability, on the ground that such concern has no legal existence because it is an unlawful combination in violation of the Anti-Trust Act. Such a defense is a mere collateral attack on the organization of the corporation which cannot lawfully be made. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

Courts may not refuse to enforce an otherwise legal contract because it might afford some indirect benefit to a wrongdoer.

The contract in this case *held* not to be intrinsically illegal because the seller agreed to give a portion of its profits to the purchaser of goods provided such purchaser dealt exclusively with the seller for a specified period and also bought the goods exclusively for purchaser's own use; and also *held* that such contract was not illegal under the Anti-Trust Act. *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, distinguished.

The Anti-Trust Act is founded on broad conceptions of public policy and its prohibitions were enacted not only to prevent injury to the individual but harm to the general public, and its prohibitions and the remedies it provides are co-extensive with such conceptions.

Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or remedy given can be only that which the statute prescribes.

The power given by the Anti-Trust Act to the Attorney General to dissolve a corporation or combination as violative of that act is inconsistent with the right of an individual to assert as a defense to a

contract on which he is otherwise legally liable that the other party has no legal existence in contemplation of that act.

In *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, the contract involved was not held illegal because a party thereto was an illegal combination under the Anti-Trust Act, but upon elements of illegality inhering in the contract itself. In this case, *held* that a party cannot assert as a defense to a suit for money otherwise due under a contract, not inherently illegal, the fact that the party otherwise admittedly entitled to recover is an illegal combination under the Anti-Trust Act.

11 Ga. App. 588, affirmed.

THE facts, which involve the construction of the Federal Anti-Trust Act, and the effect of a profit sharing contract of a corporation and those dealing with it exclusively and the right of the corporation to recover for goods sold, are stated in the opinion.

Mr. Marion Smith for plaintiff in error:

The answer shows defendant in error to be a combination in restraint of interstate trade in violation of the Federal statute; the combination merged into one corporation various firms and corporations which previously had been competitors, for the purpose, and with the effect, of restraining and monopolizing such interstate trade. The creation of a monopoly is sufficient to make the restraint unreasonable. *Am. Tobacco Co.* v. *United States*, 221 U. S. 106; *Standard Oil Co.* v. *United States*, 221 U. S. 1.

The corporate organization of the defendant in error cannot be used as a cloak to cover the fact that it constitutes an illegal combination. *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Am. Tobacco Co.* v. *United States*, and *Standard Oil Co.* v. *United States*, *supra*.

A recovery cannot be had upon an account for goods sold and delivered by such illegal combination when the goods were sold with direct reference to and in execution of agreements which had for their object and which had directly as their effect the accomplishment of the illegal

ends for which the combination was organized. *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227.

It is not necessary to show that the contracts under which the goods were sold are expressly violative of the Federal statute. The illegal intent with which the contracts were made is sufficient to make illegal contracts which appear on their face as no more than ordinary acts of competition. *Nash* v. *United States*, 229 U. S. 373; *Swift* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274.

A contract of purchase by an illegal combination which together with other similar contracts tends to create a monopoly is void and unenforceable even though the other party to the contract is ignorant of its purpose in this respect. *Brent* v. *Gay*, 149 Kentucky, 615.

A contract, which though apparently harmless in itself, is in reality a part of a general scheme to violate statutes against the restraint of trade, will be held to be illegal. *Continental Wall Paper Co.* v. *Voight, supra; Cravens* v. *Carter*, 92 Fed. Rep. 479; *Pacific Factor Co.* v. *Adler*, 90 California, 110; *Fink* v. *Schneider Granite Co.*, 187 Missouri, 244; *Detroit Salt Co.* v. *National Salt Co.*, 134 Michigan, 120.

A contract is illegal where, though harmless on its face, it is one of many similar contracts which collectively have the direct effect of aiding an illegal purpose of restraining interstate trade. *United Shoe Machinery Co.* v. *LaChapelle*, 212 Massachusetts, 467.

The scheme must be treated as an entirety. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211; *Swift* v. *United States*, 196 U. S. 375; *Montague* v. *Lowry*, 193 U. S. 38; *Loewe* v. *Lawlor*, 208 U. S. 274.

Illegality may consist in the purpose to accomplish an illegal result though the methods used are not inherently unlawful. *Hanauer* v. *Doane*, 12 Wall. 342; *Kohn* v. *Melcher*, 43 Fed. Rep. 641; *Mogul Steamship Co.* v. *Mc-*

Gregor, L. R. 61; Q. B. Div. 285; [1892] A. C. 25; Clark on Contracts, 478 *et seq.*

Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. *Hall* v. *Coppell*, 7 Wall. 542; *Armstrong* v. *Toler*, 11 Wheat. 258; *Embrey* v. *Jemison*, 131 U. S. 336.

One of the parties cannot maintain an action on the valid part of the contract discarding or omitting to prove the portion that is illegal. *McMullin* v. *Hoffman*, 174 U. S. 639.

Under the *Continental Wall Paper Co. Case* when the sales are made under and with reference to an illegal agreement, and the plaintiff sues on the sales, the defendant may thereupon plead the illegal agreement of which the sales are a part. See also: *Oscanyan* v. *Winchester Arms Co.*, 103 U. S. 261.

The cases relied upon by the defendant in error can be distinguished from the case at bar. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, which is especially stressed by the defendant in error, decided only that an illegal combination was not by reason alone of its illegal character prevented from collecting for goods sold.

If any of the cases urged by the defendant in error go to the extent of holding that this is not sufficient to make the agreement illegal, they are in conflict with the decisions of this court. *Nash* v. *United States*, 229 U. S. 373; *Swift* v. *United States*, 196 U. S. 375; *Loewe* v. *Lawlor*, 208 U. S. 274. *Bank* v. *Glass*, 169 Mo. App. 374, is not in point, nor is *Bessire* v. *Corn Products Co.*, 47 Ind. App. 313.

There is nothing to distinguish this case from the *Continental Wall Paper Co. Case*, and the decision then rendered is controlling.

Mr. James W. Austin and *Mr. Preston Davie*, with whom *Mr. Morgan J. O'Brien*, *Mr. Albert B. Boardman*

and *Mr. Young B. Smith* were on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We refer to the parties, the one as the Manufacturing, and the other as the Refining Company. Sued by the Refining Company in April, 1909, to recover the amount of the price of two lots of glucose or corn syrup which it had bought in January, 1909, and which it had consumed and not paid for, the Manufacturing Company asserted its non-liability on the following grounds which we summarize:

(a) Because the Refining Company had no legal existence as it was a combination composed of all the manufacturers of glucose or corn syrup in the United States, illegally organized with the object of monopolizing all dealings in such products in violation of the Anti-Trust Act of Congress. That having illegally brought into one organization all the manufacturers of glucose or corn syrup, the corporation had unreasonably advanced the price of the products of its manufacture to the injury of the public. (b) That this end being accomplished, the corporation sought to perpetuate its monopoly by rendering it difficult or impossible for competitors to go into the business of producing glucose or corn syrup by devising a so-called profit-sharing scheme, by which it was proposed to give to all those who purchased from the combination a stipulated percentage upon the amount of the purchases made in one year to be paid at the end of the following year provided that during such time they dealt with no one else but the combination. While the sum of the percentage thus offered, it was alleged, varied from year to year, nevertheless it was charged that in substance the contract or offer remained the same. The tender to

Gregor, L. R. 61; Q. B. Div. 285; [1892] A. C. 25; Clark on Contracts, 478 *et seq.*

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MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We refer to the parties, the one as the Manufacturing, and the other as the Refining Company. Sued by the Refining Company in April, 1909, to recover the amount of the price of two lots of glucose or corn syrup which it had bought in January, 1909, and which it had consumed and not paid for, the Manufacturing Company asserted its non-liability on the following grounds which we summarize:

(a) Because the Refining Company had no legal existence as it was a combination composed of all the manufacturers of glucose or corn syrup in the United States, illegally organized with the object of monopolizing all dealings in such products in violation of the Anti-Trust Act of Congress. That having illegally brought into one organization all the manufacturers of glucose or corn syrup, the corporation had unreasonably advanced the price of the products of its manufacture to the injury of the public. (b) That this end being accomplished, the corporation sought to perpetuate its monopoly by rendering it difficult or impossible for competitors to go into the business of producing glucose or corn syrup by devising a so-called profit-sharing scheme, by which it was proposed to give to all those who purchased from the combination a stipulated percentage upon the amount of the purchases made in one year to be paid at the end of the following year provided that during such time they dealt with no one else but the combination. While the sum of the percentage thus offered, it was alleged, varied from year to year, nevertheless it was charged that in substance the contract or offer remained the same. The tender to

the Manufacturing Company of a right to participate in the scheme, it was alleged, was first made in 1907 relative to the business done in 1906 in the form of a letter which is in the margin [1] and this offer or asserted contract was continued from year to year. It was further alleged that the scheme proved successful in accomplishing its wrongful purpose since, although subsequently independent concerns engaged in the business of manufacturing glucose or corn syrup and offered to sell their products at prices less than those charged by the combination, such concerns were virtually driven out of business because those who desired to purchase the products were deterred from buying from them for fear of losing the percentage which they would receive from the combination if all their purchases

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[1] "26 Broadway, New York, March 9, 1907.

"The D. R. Wilder Mfg. Co., Atlanta, Ga.

"Gentlemen: This company recognizing the fact that its own prosperity, in a great measure, is interwoven with the good will and cooperation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage.

"This company inaugurates such a policy of profit-sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to ten cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906.

"This amount will be paid to you or your successors on December 30, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

"With the assurance of steadfast coöperation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

"Yours very truly,

"Corn Products Refining Company."

continued to be made from it alone, and moreover because of the dread felt by purchasers that the independents would not be able to resist the overweening and controlling power of the combination. It was moreover alleged that all purchases made by the manufacturing company "contained the following clause in the contract of purchase: 'The goods herein sold are for your own consumption and not for resale.'"

Charging that the condition which made the payment of the proposed profit-sharing percentage depend upon dealing alone with the combination was void and should be disregarded, the answer asked not only that the prayer for judgment for the purchase price be rejected but that treating the failure of the Manufacturing Company to comply with the condition on which the offer of profit sharing was made as immaterial, there should be a judgment for that company for the percentage of profits on the business for the year 1908.

On motion the answer was stricken out as stating no defense. There was a judgment in the absence of further pleading against the Manufacturing Company for the price of the goods, as sued for, and rejecting its claim for the percentage of profits. This judgment was affirmed by the court below (11 Ga. App. 588) and because of an assumed failure to give effect to the Anti-Trust Act of Congress this writ of error was prosecuted.

As the context of the answer clearly justified the inference that the sale of the glucose was an interstate transaction, the court below was right in assuming that to be the case and therefore we put out of view as devoid of merit the contrary suggestion made by the Refining Company.

Having dealt with the Refining Company as an existing concern possessing the capacity to sell, speaking generally the assertion that it had no legal existence because it was an unlawful combination in violation of the Anti-Trust

Act was irrelevant to the question of the liability of the Manufacturing Company to pay for the goods since such defense was a mere collateral attack on the organization of the corporation which could not be lawfully made.[1] Besides, considered from the point of view of the alleged illegality of the corporation, the attack on its existence was absolutely immaterial because the right to enforce the sale did not involve the question of combination, since conceding the illegal existence of the corporation making the sale, the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, applying them to the identical general question here involved.

The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrong-doing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the

[1] *Finch* v. *Ullman*, 105 Missouri, 255; *Taylor* v. *Portsmouth, &c. St. Ry.*, 91 Maine, 193; *Smith* v. *Mayfield*, 163 Illinois, 447; *Detroit City Ry.* v. *Mills*, 85 Michigan, 634; *Mackall* v. *Chesapeake &c. Canal Co.*, 94 U. S. 308; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year and the clause to the effect that the goods were bought by the Manufacturing Company for its own use and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions. In fact it is not so contended in argument since substantially the proposition which is relied upon is that although such stipulations were intrinsically legal, they become illegal as the result of the duty to consider them from the point of view that one of the parties was an illegal combination interested in inserting such conditions as an efficient means of sustaining its continued wrong-doing and therefore giving power to accomplish the baneful and prohibited results of its illegal organization,—a duty which, it is urged, results from reason, is commanded by the Anti-Trust Act and the obligation to enforce its provisions and is required because of a previous decision of this court enforcing that act (*Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227) unless that decision is to be now qualified or overruled.

In the first place, the contention cannot be sustained consistently with reason. It overthrows the general law. It admits the want of power to assail the existence of a corporate combination as a means of avoiding the duty to pay for goods bought from it and concedes at the same time the legality of the condition in the sale and yet proposes by bringing the two together to produce a new and strange result unsupported in any degree by the elements which are brought together to produce it and conflicting with both.

In the second place, the proposition is repugnant to the Anti-Trust Act. Beyond question reëxpressing what was ancient or existing and embodying that which it was deemed wise to newly enact, the Anti-Trust Act was intended in the most comprehensive way to provide

against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce or attempts to monopolize the same. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions. Thus the statute expressly cast upon the Attorney-General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts under his authority and direction to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the Circuit Court of the United States with "jurisdiction to prevent and restrain violations of this act," and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended. Act of July 2, 1890, c. 647, 26 Stat. 209.

It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy

can be only that which the statute prescribes." *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35; *Barnet* v. *National Bank*, 98 U. S. 555; *Oates* v. *National Bank*, 100 U. S. 239; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; *Tenn. Coal Co.* v. *George*, 233 U. S. 354, 359; Second, because of the destruction of the powers conferred by the statute and the frustration of the remedies which it creates which would obviously result from admitting the right of an individual as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract to assert that the corporation or combination suing, had no legal existence in contemplation of the Anti-Trust Act. This is apparent since the power given by the statute to the Attorney-General is inconsistent with the existence of the right of an individual to independently act since the purpose of the statute was where a combination or organization was found to be illegally existing to put an end to such illegal existence for all purposes and thus protect the whole public,—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale and yet be held to be civilly dead for the purpose of recovering the price of such sale and then by a failure to provide against its future exertion of power be recognized as virtually resurrected and in possession of authority to violate the law. And in a two-fold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States,—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting

from such finding. In the second place because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility and not to leave it to individual action prompted it may be by purely selfish motives.

As from these considerations it results not only that there is no support afforded to the proposition that the Anti-Trust Act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but on the contrary that the provisions of the act add cogency to the principles of general law on the subject and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the *Continental Wall Paper Case, supra.*

It is to be observed in considering that contention that the general rule of law which we have stated is not apparently questioned in the argument and the controlling influence of the ruling in the *Connolly Case, supra,* if here applicable is not denied, but the contention is that the general law is not applicable and the *Connolly Case* is inapposite because of an exception which was engrafted upon the general law by the ruling in the *Continental Wall Paper Case* under which it is said this case comes. While it clearly appears that this is the contention, it is difficult to precisely fix the ground upon which it is rested. But as the rule of general law which under ordinary cir-

cumstances does not permit the existence of a corporation to be indirectly attacked is not assailed, and as it is not asserted that irrespective of the illegal organization of the corporation, the contract of sale was inherently unlawful, it follows that the proposition is the one which we have already in another aspect disposed of, that is, that the sale and its conditions although inherently legal become illegal by considering the illegal corporation and the aid to be afforded to its wrongful purposes by the conditions which formed a part of the sale. But in substance this only assumes that it was held in the *Continental Wall Paper Case* that that which was inherently legal can be rendered illegal by considering in connection with it something which there is no right to consider at all. But it is apparent on the face of the opinion in the *Continental Wall Paper Case* that it affords no ground for the extreme and contradictory conclusion thus deduced from it since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale. It is not necessary to analyze the facts and issues in the case for the purpose of pointing out how completely they are covered by the statement just made because the opinion of the court and the reasons stated by the members of the court who dissented without more make that fact perfectly clear. Indeed not only does this statement make clear the fact

that there is no conflict between the *Connolly Case* and the *Continental Wall Paper Case*, but it also establishes that both cases, the first directly, and the other by a negative pregnant, demonstrate the want of merit in the contentions here insisted upon.

It only remains to say that we think it requires nothing but statement to demonstrate that in view of the facts which we have recited and the legal principles which we have applied to them, no error was committed by the court below in refusing to give to the defendant a judgment for its alleged share of the profits for the year 1908 when it was expressly admitted that the conditions upon which the offer of a right to a participation in the profits was rested, or the contract (if there was a contract to that effect) was based, had not been complied with.

Affirmed.